

mitigation without restoring the natural hydrograph would not work and would not avoid jeopardizing the three listed species.

Because of the significance of the new Eighth Circuit rule, because it conflicts with the rule followed by other Courts of Appeals, and because of the underlying environmental significance of this case, this Court should grant certiorari.

## STATEMENT OF THE CASE

### A. Changes to the Missouri River

The Missouri River traveled by Lewis and Clark was an unruly river with multiple channels, extensive shallow water, wetlands and sandbars. The amount of water flowing down the river varied by time of year according to a regular pattern, known as the "natural hydrograph," and which "had two prominent components: the 'spring rise' and 'summer low flow.'" *In re: Operation of the Missouri River System Litigation*, 421 F. 3d 618, 625-26 (8<sup>th</sup> Cir. 1005). High flows in the spring built sandbars and overflowed regularly into a vast floodplain, where fish reproduced. *Id.* Low summer flows also exposed sandbar habitat, and created excellent conditions for juvenile fish to survive and birds and larger fish to find food. *Id.* Together, the variety of aquatic habitats and "the natural hydrograph" supported hundreds of species of fish and wildlife. *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 236 (D.D.C. 2003).

Over the course of the twentieth century, the U.S. Army Corps of Engineers reengineered the river. It constructed six large dams that transformed most of the Upper River into six large reservoirs, and it narrowed the lower river to a third of its usual width, which eliminated vast areas of wetlands, side channels and sandbars. See *id.* at 239 (general description);

J.A. XIII: 9985-9987 (2000 Biological Opinion). Despite these changes, some potentially valuable habitat remains. But the Corps' system for releasing water from the dams, reflected in a "Master Manual," continues to degrade this habitat because it "eliminate[s] the spring rise and summer low flow from the hydrograph" and replaces it with a constant medium release of water from the dams from early spring through late fall to support a small number of barges on the lower river. 421 F.3d at 626. According to a 2001 report of the National Academy of Sciences ("NAS"), 51 of 67 native river fish are now rare, uncommon and/or declining as a result of these changes, and 84 species that use the river are listed under federal or state lists of rare, threatened or endangered species. J.A. at VII: 5034, 5117-18.

#### **B. ESA Consultations from 1990 through 2000**

The species protected by the Endangered Species Act include the least tern and piping plover, birds that nest on river sandbars, and the pallid sturgeon, an ancient large fish. 271 F. Supp. at 242. Under § 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), the Corps of Engineers is prohibited from taking any action that jeopardizes the continued existence of one of these species. If the FWS finds that a government action will cause jeopardy, it can set forth a Reasonable and Prudent Alternative that establishes conditions the agency can follow to avoid jeopardy. 271 F. Supp. 2d at 241 (summarizing statutory framework).

In a series of formal and informal biological opinions since 1990, the U.S. Fish & Wildlife Service has repeatedly found that the Corps' operation of the dams to eliminate the natural hydrograph jeopardizes the tern, plover and sturgeon. *Id.* at 242; J.A. XIII:9865-9889 (2000 BiOp detailing consultation history). For terns and plovers, the elimination of the natural hydrograph degrades the sandbar habitat they need, directly floods nests and chicks in the summer, and

reduces food supply. For sturgeon, it fails to provide spawning cues, reduces food supply, and flushes juvenile sturgeon downstream during the summer. See 421 F.3d at 625-26; 271 F. Supp. 2d at 237; J.A. XIII: 10099-10103 (2000 BiOp). The plight of the sturgeon is particularly dire since "fewer than 2000 wild pallid sturgeon remain alive," primarily in the Missouri River, and they no longer appear to be reproducing in the wild because of the absence of a natural hydrograph. 271 F. Supp. at 259.

In response to the first biological opinion in 1990, the Corps made no changes to its flow regime but indicated that it would evaluate how to comply through a review of its Missouri River Master Manual. 271 F. Supp. at 243. But this review dragged on for years, and throughout most of the 1990's, the Corps violated the 1990 Biological Opinion. *Id.* Finally, in 2000, after years of urging by the FWS, the Corps consulted with it again about compliance with the ESA. *Id.* See also JA XIII:9865-9889 (2000 BiOP summary of consultation history.)

The central issue in the consultation was whether the Corps could avoid any changes to its dam releases and comply with the ESA instead by using mechanical habitat mitigation alone to create habitat for terns, plovers and sturgeon. The FWS concluded that such mechanical habitat efforts could play a partial role. The 2000 BiOp set forth a Reasonable and Prudent Alternative for the Corps that included 19,565 acres of habitat creation on a set schedule, along with a variety of secondary requirements, such as monitoring. 271 F. Supp. at 243; J.A. XIII: 10124 (2000 BiOp). But a "central premise" of the BiOp was that the Corps could only avoid jeopardy by also restoring a semblance of the natural hydrograph. 271 F. Supp. at 237, 243; J.A. XIII: 10111-10115. The word semblance meant that while the RPA required both a spring rise, and lower summer flows, the amount of the rise and flow were

relatively modest compared to those that would occur under natural conditions.<sup>2</sup> The 2000 BiOp required that these changes occur by 2003.

This conclusion was "based on literally decades of data and supported by multiple scientific panels." 271 F. Supp. 2d at 256. A panel of seven scientists jointly chosen by the FWS and the Corps – the Missouri River Peer Review Panel – unanimously concluded that physical habitat efforts alone were not adequate and that restoring at least a somewhat more natural hydrograph was critical to the survival of the sturgeon, tern and plover. 271 F. Supp. 2d at 243; J.A. XIII: 10244-48. In addition, the National Academy of Sciences issued a report in 2001 concluding that "degradation of the Missouri River ecosystem" including "the prospect of irreversible extinction of species," "will continue unless some portion of the hydrologic and geomorphic processes that sustained the pre-regulation Missouri River . . . are restored – including flow pulses that emulate the natural hydrograph." J.A. at VII: 5034-35 (discussed at 271 F. supp. 2d at 243-44). The NAS also found, "Simply constructing man-made habitat to satisfy the life-requirements of complex organisms, without changes in fundamental physical processes, is not likely to yield substantial ecological improvements." J.A. VII: 5090. The Corps of Engineers further found in its Master Manual review that the partial

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<sup>2</sup> Flows are measured by thousands of cubic feet per second, or "kcfs." The Master Manual today calls for normal navigation flows in the spring from 30 to 35 kcfs, while under natural conditions those flows would rise to 80 Kcfs. In the summer, the Master Manual typically calls for flow around 28.5 kcfs, while under natural conditions, those flows would decline to 10 kcfs. Under the 2000 BiOp, the spring rise must, once every three years, reach 50 to 55 kcfs, and the low summer flow must decline to 21 kcfs every year. 421 F.3d at 625 n.5.



restoration of the natural hydrograph required by the 2000 BiOp would actually increase overall economic benefits by \$8.8 million. 271 F. Supp. 2d at 261.

### C. Corps 2003 Refusal to Implement Flow Changes

Despite this economic validation of the 2000 BiOp, the Corps announced in January of 2003 that it would not implement the flow changes required that flow year. *Id.* at 244. The Plaintiffs in this case, national and state conservation organizations, then filed suit in the United States District Court for the District of Columbia under the ESA and the Administrative Procedure Act, 5 U.S.C. § 701 et seq., against the Corps and the FWS. *Id.* The states of Nebraska and Missouri intervened as defendants, and the state of North Dakota intervened as a Plaintiff. *Id.* at 236 n.2.

The Corps responded by yet again asking the FWS to change its views on the need for flow changes in an application submitted on April 4. Only two weeks later, without seeking public comment, the FWS issued a Supplemental BiOp that gave the Corps another year to make flow changes. *Id.* at 245. This April 2003 Supplemental BiOp emphatically reaffirmed the science and central findings of the 2000 BiOp on the need to restore the natural hydrograph,<sup>3</sup> but was based on the theory that a one-year extension would not cause irreparable harm so long as the Corps made the flow changes by 2004. *Id.*; J.A. IX: 6990-7105 (Spring 2003 Supplemental BiOp).

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<sup>3</sup> The spring 2003 Supplemental BiOp included an entire appendix setting forth the scientific literature supporting the validity of the requirement for flow changes. J.A. IX:7080-7084.

#### **D. 2003 Preliminary Injunction**

In a thorough and lengthy preliminary injunction opinion, the D.C. District Court held the Supplemental BiOp to be arbitrary and capricious and ordered the Corps to comply with the 2000 BiOp. *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230 (D.D.C. 2003). After summarizing the long consultation history between the agencies, the Court struck down the Supplemental BiOp in part because its central premise that the Corps would make flow changes in 2004 conflicted with the Corps' absolute refusal to make such a commitment. *Id.* at 253. The Court also held that the FWS had failed to adequately explain its "total abandonment of the need for low flow targeted as absolutely necessary in the 2000 BiOp." *Id.* at 256. In entering the preliminary injunction, the Court found that the "pallid sturgeon is on the brink of extinction." *Id.* at 259-61.

The Corps refused to comply with this injunction and was held in conditional contempt. *American Rivers, v. Army Corps of Engineers*, 274 F. Supp. 2d 62 (D.D.C. 2003). However that very summer, the panel on multi-district litigation transferred the case to the District of Minnesota to be consolidated with litigation between the states in the basin regarding the Corps' dam management responsibilities under the Flood Control Act of 1944. The Corps took advantage of the resulting confusion to defy the preliminary injunction and only instituted the required low summer flow for a short time. 421 F.3d at 627.

#### **E. 2003 Amended BiOp and New Master Manual**

In November 2003, the Corps again initiated consultation with the FWS and sought permission to avoid any restoration of high spring or low summer flows. In response, the FWS summarily replaced the team of scientists who had worked on the River for over a decade with a new

self-referenced "SWAT" team headed by a lawyer and FWS regional director from the southwest. J.A. at VIII: 06232, 06230. The additional scientific materials in the record considered by this team continued to call unanimously for some restoration of the natural hydrograph, including comments by the fish and game agencies of the states within the basin, and their joint association.<sup>4</sup> But the FWS hurriedly issued an amended Biological Opinion ("BiOp") in December 2003 that reversed its long-standing position requiring flow changes.

The central feature of this Amended Biological Opinion was the unexplained contradiction between its ultimate result and the scientific findings set forth throughout the opinion. The Amended BiOp did not alter the finding of the 2000 BiOp that ongoing management of the Missouri River dams jeopardized the three species. 421 F.3d at 627; J.A. IX:6791; Am Rivers Supp App 6. The Amended BiOp also repeatedly reiterated that in addition to mechanical habitat creation, at least some restoration of the natural hydrograph was necessary to avoid jeopardy (all emphases supplied):

"Continued survival of listed species depends on restoration of riverine form and functions, as well as

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<sup>4</sup> See generally J.A. at IX: 6266-337. These materials stressed that "physical habitat is ecologically inseparable from the hydrograph which serves as a catalyst for driving the entire river ecosystem," *id.* at 6310, that "flows that are a semblance of the historic hydrograph are necessary for the long-term ability of these populations," *id.* at 06284, and that "in virtually all instances of successful rehabilitation of large rivers, it is essential to retain or reestablish some semblance of the natural hydrological cycle," *id.* at 6268. For comments of the various state fish and wildlife agencies from both the upper and lower basins, see J.A. IX:6362, 6395, 6399-405, 6422-75, 6476-90.

some semblance of the pre-development or natural hydrograph." J.A. IX:6802, 6824.

"Until a semblance of the normalized hydrograph is restored and habitat is generated and maintained through re-establishment of these processes, listed species will continue to decline and their capability to achieve recovery will continue to diminish." J.A.IX: 6639.

"The primary elements necessary to avoid jeopardy to listed species have not changed substantially since they were first outlined in the 1990 Biological Opinion, and later refined in the 2000 Biological Opinion. Information gained from experience during the last 13 years reinforces the need for immediate adoption of those elements." J.A. IX: 6835.

The Amended BiOp at several points also explicitly rejected the Corps' request to rely entirely on the mechanical habitat creation requirements set out in the 2000 BiOp, finding that mechanical habitat mitigation alone would not work.

"The proposed accelerated habitat restoration program in the Lower Missouri River will have little benefit to the pallid sturgeon without a concurrent or subsequent change in operations to provide a more normalized hydrograph to (1) provide the spawning cues that are critical for pallid sturgeon reproduction and (2) allow larvae and juveniles to move into shallow water habitat." Am. Rivers' Supp. Appx. At 5 (emphasis supplied); see also J.A. IX: 6795 (almost identical statement).

"The Service has determined restoration of a normalized river hydrograph below Gavins Point Dam [the lowest river dam] is still necessary to avoid jeopardizing the continued existence of the pallid sturgeon." J.A. IX: 6847.

"It is the Service's opinion that, to the extent that [mechanically engineered] habitat is developed . . . the level of benefit will largely be determined based on the design location and diversity of the habitat developed coupled with a change in the hydrograph." J.A. IX: 6783.

Despite these findings reaffirming the 2000 BiOp, the new Reasonable and Prudent Alternative did the opposite. It first completely deleted any requirement for flow changes to avoid jeopardy to the tern and plover. For terns and plovers, the Amended BiOp did at least offer some brief explanation - although that discussion contradicted the repeated findings quoted above.<sup>5</sup>

For the pallid sturgeon, the Amended BiOp had much of the same effect on the natural hydrograph but without any explanation whatsoever. Although the Amended BiOp explicitly rejected Corps' arguments for a delay for further

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<sup>5</sup> The Eighth Circuit discussed these rationales 221 F.2d at 635-36. The main rationale -- mentioned in passing by the FWS early in its opinion -- was that new Corps computer modeling allegedly showed that flow changes would not benefit tern and plover sandbar habitat. The Court did not address Plaintiffs' contention that there was no such modeling, and that the Corps final EIS directly contradicted this assertion and found that the flows required by the 2000 BiOp would increase tern and plover sandbar habitat by 74%. J.A. X:7708 (comparing GP2021, the 2000 BiOp alternative, with CWCP, the current water management). But the more dramatic contradiction was that between the result of the Amended BiOp and the explicit, repeated findings throughout it that restoration of a normalized hydrograph was necessary to avoid jeopardy to terns and plovers. For pallid sturgeon, there is no explanation for the basic changes to the RPA at all. But for terns and plovers, it is the legitimacy of upholding such a contradictory agency decision that is fairly encompassed in the question presented.

study,<sup>6</sup> it eliminated the requirement to implement the 2000 BiOp's spring rise immediately, and gave the Corps instead until 2006 to develop a new plan. Even more significantly, the Amended BiOp effectively eliminated the summer low flow by allowing the Corps to cancel it once the Corps had fulfilled a small part of its long-standing obligation to construct habitat mechanically, dating to the 2000 BiOp. In particular, the 2003 Amended BiOp now indicated that once the Corps had constructed 1,200 of those acres – just six per cent of the total habitat mitigation already required -- the Corps could ask the FWS to eliminate the low flow requirement. This was apparently a last minute addition, as drafts of the RPA dated less than one week before the releases of the Amended BiOp do not contain this cancellation provision. J.A. IX:6601-04; Am Rivers Supp. App. at 44-45. The Corps then sought, and the FWS granted, the elimination of a summer low flow that forthcoming June.

In short, even while the Amended BiOp continued to find that mechanical habitat mitigation would not work unless coupled with restoration of the natural hydrograph, the FWS eliminated altogether the requirement to restore at least half of that hydrograph, the low summer flow.

#### **F. New Missouri River Master Manual**

In March 2004, the Corps followed up this Amended BiOp by issuing a Final EIS and a Record of Decision for a new Master Manual. This EIS again found that the flows required by the 2000 BiOp would produce a net economic gain over previous management, would continue to meet all

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<sup>6</sup> In two places, the Amended BiOp explicitly rejected the Corp's request to delay flow changes for further study on the grounds that a delay would provide no useful information and failed to reflect the imminent threat of the pallid sturgeon's extinction. J.A. IX: 6639-41, 06781.



project purposes, and would have only modest adverse effects on any one purpose.<sup>7</sup> At the same time, the EIS found that the flow changes would have enormous environmental benefits for endangered species, including large increases in tern and plover habitat, and in spawning cues and shallow water habitat for sturgeon.<sup>8</sup>

Despite these findings, the plan adopted by the new Master Manual included no restoration of the natural hydrograph. Instead the Corps adopted a flow plan that largely maintained the status quo with some new drought restrictions. In selecting this alternative, the Corps offered an extremely cursory explanation of why that option was preferable to the previous water control plan. 363 F. Supp. 2d at 1167-68 (quoting language); J.A. X:7923. But the Corps never explained why it chose its preferred alternative over the more natural flow plan set forth in the 2000 BiOp.

### **G. Opinions of District Court and Court of Appeals**

Because the Amended BiOp and Master Manual dropped any restoration of the natural hydrograph without explanation and in contrast to a unanimous scientific record, Plaintiffs amended their complaint and pressed their suit. The focal point of their claim was that the agency decisions were

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<sup>7</sup> J.A. at X: 07859, 07877 (Tables 7.13-1 & 7.15-3) (finding that the 2000 BiOp, modeled by the code GP2021 would have \$5.3 million in benefits on the Missouri River over the Current Water Control Plan and an additional \$7.3 million in benefits (expressed as reduced costs) from improved navigation on the Mississippi River); J.A. X: 7914 (Table 7-20-1 finding minimal, no, or positive effects on other economic uses); J.A. X:7986-97 (finding final alternatives "all within the broad discretionary delegation provided by Congress to the Corps in operating the Mainstem Reservoir System.").

<sup>8</sup> J.A. X: 07730 (large gain in shallow water habitat); J.A. X:07932-34 (large increase in spawning cues for sturgeon); J.A. X:07708 (large increase in sandbar habitat for terns and plovers).

arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), because of this lack of explanation, and the contradiction with actual agency findings of the importance of flow changes. In defending these claims, the federal defendants never pointed to any explanatory language by either agency, but instead offered post hoc rationalizations of counsel that wove novel explanations out of facts in the record.

In June 2004, the District Court for the District of Minnesota granted summary judgment for the Defendants in a consolidated opinion that also addressed claims brought in related cases involving the Missouri River by the various basin states and other parties. *In re: Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (D. Minn. 2004). This decision credited these explanations of counsel, *id.* at 1158-59, but never addressed Plaintiffs' claims that the FWS and Corps never offered the explanations themselves, and in fact set forth contradictory findings.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed. *In Re: Operation of the Missouri River System Litigation*, 421 F.3d 618 (8<sup>th</sup> Cir. 2005). This decision acknowledged that the Amended BiOp itself offered no explanation for the elimination of the low summer flow. It further acknowledged that the Amended BiOp included statements contradicting the claim that mechanical habitat restoration efforts would benefit sturgeon in the absence of a "more normalized hydrograph." 421 F.3d at 634. But relying on a series of facts highlighted for the first time in judicial briefs, the Court held that "evidence in the record adequately explains the decision made by the FWS." *Id.*

For similar reasons, the Eighth Circuit rejected Plaintiffs' claim that the Corps had not explained why it selected its Master Manual over the natural hydrograph set forth in the 2000 BiOP. 381 F.3d at 636-37. Although the

Court acknowledged that the Corps offered no "prose" explanation for this choice, it explained that the final EIS included tables that compared the results of different alternatives. 421 F.3d at 637. According to the Court, the Corps' rationale was clear because the "preferred alternative" scored better than the 2000 BiOp according to a few of the economic criteria set forth in those tables. In fact, the FEIS contains scores of tables that compare alternatives using scores of criteria, with different alternatives doing better on some and not on others. At no point in prose or through any other method did the Corps point particularly to any of the criteria relied upon by the Corps lawyers and by the Court.

## REASONS FOR GRANTING THE WRIT

### 1. The principle of agency review announced below would make APA review effectively meaningless.

The opinions below reveal a swirl of competing legal claims regarding the Endangered Species Act, and the Corps' obligations under the Flood Control Act of 1944. But the most important, and decisive legal principle at issue in this case is the well established principle that an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted), and a decision challenged under the Administrative Procedure Act, 5 U.S.C. § 706, "must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50. This is arguably the most fundamental principle of administrative law and dates to this Court's opinion *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). According to this principle, a reviewing court examines the evidence in the record not to discern a rationale, but instead to determine if the rationale actually offered by the agency "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed

to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.<sup>9</sup>

In addition, "an agency changing its course," as the FWS did here, is particularly "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *State Farm*, 463 U.S. at 42. This is so because "a settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." *Id.* at 41-42. (internal quotation marks and citation omitted). In *State Farm*, this Court overturned a change in agency position precisely because the change in course was not adequately explained, and this Court refused to credit explanations given for the first time in court.

Since that case, this Court has continued to endorse and cite this principle. See, e.g., *Allentown Mack Sales and Service v. NLRB*, 522 U.S. 359, 374-75 (1998) (explaining why "reasoned decisionmaking" and "sound results" are promoted when courts reverse agency decisions "which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce"); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (reaffirming that review in NEPA case is based on agency rationale and support for it in the record); *Bowen v. American Hospital Association*, 476 U.S. 610, 643 (1986) (reversing agency decision because record evidence did not support agency's "own chosen rationale").<sup>10</sup>

<sup>9</sup> This Court confirmed in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), that a biological opinion is reviewable under the APA as final agency action.

<sup>10</sup> To be sure, there is some tension between this Court's instruction that an agency "must cogently explain why it has exercised its discretion in a given manner," *State Farm*, 463 U.S. at 48, and its acknowledgement that it will "'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,'" *id.* at 43.

Instead of reviewing the FWS and Corps decisions in this case according to the rationales they actually provided, the Eighth Circuit instead formulated a rule that an agency decision should be upheld if the "evidence in the record adequately explains the decision." 421 F.3d at 634 (emphasis supplied). The Court similarly held that even if a court's decision does not explain the rationale, the law only requires that the "rationale is present in the administrative record underlying the document." *Id.* (citation omitted). While this formulation sounds similar to *State Farm*, it is in fact the converse. Under the proper standard of review, a court first examines the rationale offered by the agency, and then examines whether the evidence in the record provides reasonable support for that rationale. *See, e.g., Bowen*, 476 U.S. at 643. But under the Eighth Circuit's new approach, a court, relying on defense counsel, may formulate a rationale to fit the evidence. That is the quintessence of improper reliance on post-hoc rationalizations. *State Farm*, 463 U.S. at 50; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself") (emphasis supplied).

The error by the Eighth Circuit below is traceable in part to its reliance on and quotation of that court's earlier, incorrect formulation of the standard of review in *Voyageurs National Park Ass'n v. Norton*, 381 F.3d 759, 763 (8<sup>th</sup> Cir.

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But this latter formulation, quoting *Bowman Transportation, Inc., v. Arkansas -Best Freight System, Inc.*, 419 U.S. 281 (1974), has not allowed a court to make up a rationale out of the record. Instead, it has referred to the clarity with which an actual and explicit agency rationale demonstrates its "treatment of the evidence." 419 U.S. at 290. One reason to grant the writ is to provide additional clarity so that future lower courts do not repeat the Eighth Circuit's mistake.



2004). There the Court held, "If an agency determination is supportable on any rational basis, we must uphold it." *Id.* (quoted below at 421 F.3d at 628). That formulation is incorrect because a court must only uphold agency action on the rational basis articulated by the agency. The Eighth Circuit has, in effect, confused APA review with the much more permissive review of legislative action subject only to arbitrariness or rational basis scrutiny under Substantive Due Process or Equal Protection.

As this Court explained in *Marsh*, the alternative approach now followed by the Eighth Circuit would "not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" 490 U.S. at 395 (citation omitted). The approach has a particularly large effect in a case with a voluminous record, such as this one. In such a case, there will always be large numbers of facts that taken out of their true scientific context, or emphasized beyond their true significance, could be cited to justify a decision. But that does not show the agency relied on those facts or that agency experts considered such reliance to be reasonable.

Because the Eighth Circuit ruling governs the basic standard of review for agency action, it will have enormous ramifications for a wide range of cases. This Court should grant certiorari first and foremost because of the vast legal significance of the principle enunciated below.

## **2. Conflicts among the courts of appeals.**

This Court should also grant certiorari because the Eighth Circuit's decision creates a split between the circuits on whether a court should uphold an agency decision only on the rationale articulated explicitly in its decision. Just last month, the Court of Appeals for the Ninth Circuit overturned



a biological opinion under the ESA on the grounds that it did not provide a reasoned explanation for its result and rejected the argument that the decision could be held based on "implicit" reasoning. Even while noting that an agency decision may be upheld on a reason expressed with less than "ideal clarity," the Court rejected reliance on "unstated assumptions" in favor of a focus on what the agency actually said in the biological opinion itself. *Pacific Coast Federation of Fishermen's Association v. United States Bureau of Reclamation*, 426 F.3d 1082 (9<sup>th</sup> Cir. 2005). Citing the same rule, the Ninth Circuit has also reversed a decision to list a species for protection under the ESA because the FWS's listing decision was "devoid" of discussion on a critical issue, and a court cannot "be compelled to guess at the theory underlying the agency's action." *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 848-49 (9<sup>th</sup> Cir. 2003) (quoting *Chenery*).

The Third Circuit has also rejected the Eighth Circuit's view that a court may discern a rationale from underlying evidence in the record. "Even if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings and for the reasons stated by the agency." *W.R. Grace & Co. v. United States EPA*, 261 F.3d 330, 338 (3<sup>d</sup> Cir. 2001) (citations and quotations omitted). In that case, the Court rejected an order under the Safe Drinking Water Act because the Environmental Protection Agency had failed to provide a satisfactory rationale in the order itself. The court refused to consider one study in the record that might provide support for the order because none of the agency analysis "purports to rely upon the recommendation in that report." *Id.* at 342

Similarly, the DC Circuit has consistently held that "[t]he agency must make clear the 'basic data and the whys and wherefores' of its conclusion," so the court is not "left to

guess as to the agency's findings or reasons." *American Municipal Power-Ohio, Inc. v. FERC*, 863 F.2d 70, 73 (D.C. Cir. 1988). See also *State of New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (reversing regulation because of EPA's failure to explain rationale); *Sierra Club v. Browner*, 167 F.3d 658, 665 (D.C. Cir. 1999) (reversing two features of agency regulation for lack of adequate explanation even where "potential rationale for EPA's method was made clear in the briefs for the agency"); *JSG Trading Corps v. USDA*, 176 F.3d 536, 546 (D.C. Cir. 1999) (rejecting decision because there is no basis "in the explanations offered by the agency" for it, and the court "cannot sift through the record evidence to find support for the result").

The Fifth Circuit has also rejected the Eighth Circuit approach. In *Chemical Mfrs Ass'n v. EPA*, 899 F.2d 344, 359 (5th Cir. 1990), it vacated and remanded a regulation under the Toxic Substances Control Act because EPA had not articulated a proper rationale for the decision and rejected a rationale offered for the first time by counsel because "agency action must be sustained, if at all, on the basis articulated by the agency itself."

As Judge Luttig has explained, the rule is founded in the separation of powers, and "it is as unacceptable for a court to generate its own reasons for agency action, as it is to substitute its own views for those of the agency as to the propriety of particular action." *McDaniels v. United States*, 300 F.3d 407, 415 (4th Cir. 2002)(J. Luttig, dissenting). If the Eighth Circuit rule stands, challenges to federal agency actions, which may often be brought in a variety of forums, will be rejected if brought there but not if brought elsewhere. This Court should grant certiorari to resolve this circuit split.

### 3. This case highlights why courts should review agency decisions based on actual agency explanations.

The facts of this case highlight the impropriety of the new principle of review enunciated by the Eighth Circuit. The rationale found by that court for the FWS' dramatic change in position not only takes selective pieces of evidence irrationally out of context but also contradicts the FWS' actual findings.

For example, in upholding the abandonment of the low summer flow, the Court noted that one of the effects of the low summer flow would be lower water levels that by themselves created almost 1,200 acres of shallow water habitat. To the Court, this fact implied that creating the 1,200 acres through mechanical means could "substitute" for the low summer flow. 421 F.3d at 633-34.

But the essential point of the whole thirteen year history of consultation between the FWS and the Corps – and the explicit findings by the NAS, other independent peer review, and all the biological testimony in the record – was that mechanical habitat creation cannot substitute for more natural flows because that habitat would not work except in conjunction with a more natural hydrograph. Thus, the 2003 Amended BiOp itself found "accelerated habitat restoration in the Lower Missouri River will have little benefit to the pallid sturgeon without a concurrent or subsequent change in operations to provide a more normalized hydrograph." J.A. IX:6795 (quoted 421 F.3d at 634). That is why the 2000 BiOp already required both. 271 F. Supp. 2d at 243.<sup>11</sup> That is why the 2003 Amended BiOp also found that "[u]ntil a

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<sup>11</sup> Among other reasons, the 2000 BiOp explained that high flows kept river velocities high and prevented juvenile sturgeon from finding their way through the river to slack water areas. J.A. at XIII: 10088, 10111, 10135.

semblance of the normalized hydrograph is restored and habitat is generated and maintained through re-establishment of these processes, listed species will continue to decline and their capability to achieve recovery will continue to diminish." J.A. IX: 6639.

Furthermore, the 2000 BiOp already obligated the Corps to construct far more than 1,200 acres of habitat in addition to flow changes. *See supra* at 5. Logically, the sheer retention of this requirement could not by itself provide "a reasoned analysis" for the FWS to change its position and now treat the 1,200 acres as a substitute for flow changes. *State Farm*, 463 U.S. at 42.<sup>12</sup>

The Court of Appeals followed the same, misguided principle of administrative law in upholding the Corps choice of a new Master Manual. All parties agree that the Corps has substantial discretion under 1944 Flood Control Act to balance the competing interests on the river in formulating a Master Manual. *South Dakota v. Ubbelohde*, 330 F.3d

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<sup>12</sup> That same basic logical problem applies to the other factors cited by the Court of Appeals, but not by the FWS itself, to justify the abandonment of the low summer flow. The Court noted that the Amended BiOp retains a spring rise requirement (albeit a vague one to be based on a new Corps plan for 2006) to provide spawning cues to the sturgeon, and requires that the Corps monitor pallid sturgeon populations. But these requirements were also a part of the 2000 BiOp, 271 F. Supp. 2d at 243, and therefore by themselves cannot logically offer any justification for amending the 2000 BiOp to delete the requirement for low summer flows. The Court also noted that low summer flows would harm one particular chute in Missouri where a juvenile pallid sturgeon was once found. But there is nothing in the Amended BiOp or any other FWS document, and the Court pointed to no such language, placing special emphasis on this one chute at the expense of overall river habitat. To the contrary, the Amended BiOp held that another river area, the "reach below Gavins Point is critical for pallid sturgeon reproduction," but needed more natural flows to help sturgeon. *Am. Rivers. Supp. App. 5* (Exec. Summ.).

1014, 1019-20, 1027 (8<sup>th</sup> Cir. 2003). But Plaintiffs challenged the Corps' release of the new Master Manual in April, 2004 because the Corps never explained why its "preferred alternative," which did not restore any part of the natural hydrograph, was preferable to the alternatives that did, including the specific flow regime required by the 2000 BiOp. Instead, the Corps' only brief explanation focused solely on why the preferred alternative was an advance over the Corps' previous management plan, and was set forth in a final chapter devoted only to that limited comparison.<sup>13</sup>

The Court of Appeals agreed with Plaintiffs that the Corps never offered an explanation in "prose" why its chosen alternative was preferable to the natural hydrograph alternative expressed by the 2000 BiOp. 421 F.3d at 637. But following its principle that the Court could try to discern a rationale from facts in the record, the Court burrowed into the EIS itself and found it in a few out of hundreds of tables, which showed the Corps' alternative superior to the 2000 BiOp for a few economic factors.

This ruling was not only again erroneous as a matter of law because the Corps itself never placed greater weight on those particular factors or tables over others, but it was also irrational. For example, while the Court noted that the Corps' chosen alternative produced more summer revenue

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<sup>13</sup> The Corps' sole explanation was that the Preferred Alternative, compared to current management, "conserves more water in the upper three lakes during extended droughts, meets the needs of ESA-listed fish and wildlife species, is consistent with the Corps' responsibilities under environmental laws, and Tribal Trust responsibilities, and provides for the Congressionally authorized uses of the system." *In re: Missouri River System Litigation*, 363 F. Supp. 2d at 1168 (quoting J.A. X: 7923). The federal government does not dispute that these explanations apply equally to the 2000 BiOp alternative and therefore do nothing to explain why the chosen alternative was preferable to it.



from hydropower production than the 2000 BiOp's flow plan, 421 F.3d at 636, the EIS also showed that the 2000 BiOP plan produced more total economic benefits from hydropower when all seasons were counted.<sup>14</sup> The Court also relied on a table showing that the Corps alternative had slightly higher benefits for Missouri River navigation, 421 F.3d at 636-37, but the EIS also showed that the more natural hydrograph precisely offset those effects with higher benefits for Mississippi River navigation compared to the Corps alternative.<sup>15</sup>

In fact, the final EIS presents dozens of criteria, and evaluates the impact of different alternatives on many criteria for multiple river segments and different seasons.<sup>16</sup> It was

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<sup>14</sup> The flows required by the 2000 BiOp were modeled by the code term GP2021. The final EIS showed that this alternative produced a total of \$4.43 million more in hydropower revenue than the Corps' preferred alternative. *Compare* J.A. X:7821, Table 7.10(1) (GP2021 produces \$678.75 million in economic benefits) *with* J.A. X: 7938, Table 8.3-15 (Corps preferred alternative produces \$674.32 million in hydropower benefits).

<sup>15</sup> Even in tables, the final EIS never directly compares the flow management required by the 2000 BiOp (coded GP2021) with the Corps' Preferred Alternative. But through diligent effort, it is possible to compare the two options from different parts of the EIS. Comparing different tables shows that the 2000 BiOp has \$3.73 million more in Mississippi River benefits compared to the Preferred alternative. *Compare* J.A. X:7877, Table 7-15 (\$7.29 million in Mississippi River navigation benefits for GP2021 over CWCP, the previous water management) *with* J.A. X:07938, Table 8.3-21 (showing \$3.56 more in navigation benefits for the preferred alternative than CWCP). By contrast, the Preferred Alternative has \$3.73 million more benefits for Missouri River navigation than the 2000 BiOp. *Compare* J.A. X:7853 (Table 7.12.1) (\$5.62 million) *with* J.A. 7940 (Table 8-3-18) (9.35).

<sup>16</sup> The lists of figures and tables show more than 100 figures and 50 tables that compare different alternatives on the basis of different criteria. J.A. X:7227-7235



incumbent on the Corps, not the Court, to articulate a rational basis for weighing these criteria and balancing competing interests. Nothing in the EIS or any other Corps document explains why the decision should turn on the few particular factors highlighted by the Court rather than the aggregate economic and environmental effects, by which the more natural flow alternative did extremely well. *See* 271 F. Supp. 2d at 260.

Indeed, while the Corps claimed that it chose the preferred alternative over previous water management in part because it “‘meets the needs of ESA-listed fish and wildlife species,’” 363 F. Supp. 2d at 1168 (quoting EIS), the Corps alternative did not include any kind of spring rise for the period beyond 2006, which the 2003 Amended BiOp still required. For this reason, the Corps admitted elsewhere in the EIS that its plan did not comply with the ESA and would only do so if the FWS again changed its mind or the Corps obtained an ESA exemption under the strenuous terms for that exemption. J.A. X: 7650.<sup>17</sup> The FWS therefore also commented that the preferred alternative “is not consistent with the . . . Amended 2003 BiOp, does not include the flow provisions of the RPA elements, and does not achieve the desired goal of avoiding jeopardy to listed species.” J.A. XII: 08869. Because the flows required by the 2000 BiOp unquestionably did comply with the ESA, the Corps’ failure to explain why it chose the PA over the 2000 BiOp alternative takes on special significance.

The essential holding of the Eighth Circuit below was that so long as the Corps set forth factual data in the EIS by which the different alternatives could be compared by a third party, it met its legal obligations. 431 F.2d at 636-37. But in

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<sup>17</sup> The EIS at J.A. X:7650 refers to an alternative called MCP. The Preferred Alternative was a variation of MCP, and like it, does not include a spring rise. J.A. X:7921.

doing so, the courts ignored the Corps' obligation to articulate "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. This is particularly harmful in a case involving an EIS since an EIS will typically include large quantities of data by which a third party can compare alternatives, and according to these courts, that alone would replace the agency's obligation to make a reasoned decision.

#### **4. The importance of the Missouri River ecosystem**

Finally, this Court should grant certiorari in this case because of the great importance of the Missouri River ecosystem in the United States. The Missouri River and its floodplain supported a productive, diverse and unique assemblage of fish and wildlife, but the changes at issue in this case have led to conditions under which fully eighty-five of the species that use it are listed under federal or state endangered species lists according to the NAS. J.A. at VII: 5117-18. The NAS has warned that this "degradation," including the "prospect of irreversible extinction of species" will continue unless "flow pulses that emulate the natural hydrograph" are restored. J.A. at VII: 05034-35. In the 2003 Amended BiOp itself, the FWS warned that the "need to protect other species in the Missouri River is increasing," and that many of these species would benefit from the same actions needed to protect the pallid sturgeon. J.A. IX:6639.

Meanwhile the analyses of the Corps of Engineers itself -- despite that agency's strong resistance to change -- show that these changes would come without any overall economic cost and while continuing to support all project purposes. That support would continue with only modest impacts even for navigation on the lower Missouri River, which the Corps estimated as generating only one half of one per cent of the Missouri River's economic benefits. J.A. X:7859 (Table 7 13-1 showing roughly \$9 million in navigation benefits out

of roughly \$1,800 million total). Indeed, just prior to the Corps' release of its Master Manual, the last two commercial barge haulers on the river announced that they would no longer use it because market demand had shifted – the end of a long and steady decline. J.A. II: 1342-56 (Report of Dr. Robert Stearns); *see also* J.A. I:271-330 (economic reports discussing decline of Missouri navigation). While the main purpose of high river flows during the summer months is to support barging, there are now almost no barges to support.

In short, the agency findings show that rational decision-makers could avert a serious environmental crisis while simultaneously making modest economic improvements and meeting all other statutory goals. This is therefore precisely a case in which normal principles of judicial review are important to assure that agencies base their decisions on sound science applied to the appropriate criteria instead of inertia or impermissible favoritism.

### CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

TIMOTHY D. SEARCHINGER  
MICHAEL BEAN\*  
ENVIRONMENTAL DEFENSE  
1875 Connecticut Avenue, N.W.  
Washington, D.C. 20009  
(202) 387-3500

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\* *Counsel of Record*

**APPENDIX A**

**PRIOR OPINIONS**

**In re: Operation of the Missouri River System Litigation. No. 04-2737, American Rivers, Inc.; et al, v. United States Army Corps of Engineers; et al. No. 04-2774, State of Nebraska, Appellant, v. United States Army Corps of Engineers; et al. No. 04-2785, Nebraska Public Power District, Appellant, v. United States Army Corps of Engineers; et al. No. 04-2794, State of Missouri, Appellant, v. United States Army Corps of Engineers; et al. No. 04-2878, The Mandan, Hidatsa and Arikara Nation, Appellant, v. United States Army Corps of Engineers; et al. No. 04-2994, Blaske Marine, Inc.; et al, v. United States Army Corps of Engineers; et al.**

**No. 04-2737, No. 04-2774, No. 04-2785, No. 04-2794, No. 04-2878, No. 04-2994**

**UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH  
CIRCUIT**

***421 F.3d 618; 2005 U.S. App.  
LEXIS 17224; 61 ERC (BNA) 1038***

**April 11, 2005, Submitted  
August 16, 2005, Filed**

**JUDGES:** Before WOLLMAN, BEAM, and GRUENDER,  
Circuit Judges.

**OPINION:** GRUENDER, Circuit Judge.

In these consolidated appeals, various parties challenge the operation of the Missouri River main stem reservoir system by the United States Army Corps of Engineers ("the Corps") and associated wildlife assessments produced by the United States Fish and Wildlife Service ("FWS"). The district court n1 granted summary judgment to the Corps and FWS and their named individual officers (collectively "the Federal Defendants") on all claims. For the reasons stated below, we dismiss three claims as moot and affirm the judgment of the district court on all remaining claims.

n1 The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

## I. BACKGROUND

The Missouri River originates in Montana and runs through North Dakota, South Dakota, Nebraska, Iowa, Kansas and Missouri before emptying into the Mississippi River. In its natural state, the river subjected the surrounding basin to extensive flooding every spring. With the *Flood Control Act of 1944* ("FCA"), Congress authorized the construction of a dam and reservoir system on the upper river to control the flooding. In addition to flood control, the FCA envisioned that the reservoirs would provide water for local irrigation projects, steady release into the river during the summer months to support downstream navigation, hydroelectric power generation and lake recreation. The FCA delegated construction and management of the main stem reservoir system to the Corps. n2

n2 The main stem dams and reservoirs are Fort Peck Dam (Fort Peck Lake) in Montana, Garrison Dam (Lake Sakakawea) in North Dakota, and Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case) and Gavins Point Dam (Lewis and Clark Lake) in South Dakota.

The current challenges to the Corps' operation of the system arise from two directions. First, a persistent drought in the Missouri River basin has led to a recurring conflict between upstream and downstream water-use interests. In 2002, the Corps planned to release water from Lake Oahe into the river to maintain downstream navigation throughout the summer. South Dakota, fearing a negative impact on the seasonal fish spawn in Lake Oahe and concordantly on the reservoir's sport fishing industry, obtained an injunction in federal district court preventing the Corps from lowering any reservoir in South Dakota until after spawning season. When the Corps decided to lower Lake Sakakawea instead, North Dakota obtained a similar injunction. Not to be outdone, Montana obtained an injunction to prevent releases from Fort Peck Lake. In response, Nebraska obtained an injunction ordering the Corps to make the required releases to support navigation as called for by the Corps' Missouri River Main Stem Reservoir System Master Water Control Manual ("1979 Master Manual").

In a consolidated appeal of these injunctions, we ruled that the FCA vested the Corps with discretion to balance the competing water-use interests. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003). Because the FCA's legislative history and its interpretation by the Supreme Court "indicate[] that the Corps's primary concerns should be flood control and navigation," we upheld the Corps' decision to follow the 1979 Master Manual and draw down the reservoirs to support downstream navigation. *Id.* at 1032.

The second point of conflict has been that flood prevention and steady summer flows for downstream navigation disrupt the natural habitat of protected bird and fish species in the Missouri River ecosystem. In litigation initially separate from the *Ubbelohde* cases, environmental groups have attempted to force the Corps to operate the system to produce more "natural" river flows to benefit the protected species. To understand the current stances of the



parties in this litigation, it is necessary to review in some detail the Corps' previous attempts to accommodate competing interests while developing its operating procedures.

The Corps sets forth its general operational guidelines for the Missouri River reservoir system in a Master Manual and the operational details for each year in an Annual Operating Plan. The first Master Manual was published in 1960 and revised in 1973, 1975 and 1979. The year 1987 brought the onset of the first persistent drought in the region since the reservoir system had become fully operational. Because it found that the operational procedures in the 1979 Master Manual were not well-tailored to handle a persistent drought, the Corps began the revision process for what would become the 2004 Master Manual.

The operation of the reservoir system also brings the Corps within the provisions of the Endangered Species Act ("ESA"). Under the ESA, if a government agency concludes that a proposed action may "jeopardize the continued existence" of any protected species or adversely affect its critical habitat, the agency must prepare a Biological Assessment and consult with the FWS. ESA § 7, 16 U.S.C. § 1536. The FWS then issues a Biological Opinion ("BiOp") describing how the action will affect the species, based on the "best scientific and commercial data available." *Id.* at § 1536(a)(2). If the FWS concludes that the proposed action would cause jeopardy to an endangered or threatened species, the BiOp must include a Reasonable and Prudent Alternative which would allow the agency to implement the desired action while avoiding jeopardy to the species. *Id.* at § 1536(b)(3)(A). Finally, if it appears incidental "take" will occur even if the Reasonable and Prudent Alternative is implemented, the BiOp must include an Incidental Take Statement setting conditions under which the agency may proceed while avoiding liability for the incidental harm to the protected species. *Id.* at § 1536(b)(4).

n3 The ESA prohibits "taking" of endangered species. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(14), 16 U.S.C. § 1532(19).

The Corps followed the above process with three protected species in the Missouri River basin: the pallid sturgeon, a fish listed as endangered since 1990; the least tern, a migratory bird listed as endangered since 1985; and the piping plover, a migratory bird listed as threatened since 1985. The pallid sturgeon spends its entire life cycle in the Missouri and Mississippi Rivers and their tributaries, while the tern and plover both nest in the summer on sparsely vegetated sandbars along the rivers. In 2000, the FWS issued a Biological Opinion ("2000 BiOp") finding that the Corps' proposed operation of the reservoir system was likely to jeopardize the continued existence of the three species.

The FWS found that the harm to the species resulted from the alteration of the river's natural hydrograph. n4 Before the construction of the dams, the hydrograph had two prominent components: the "spring rise" and "summer low flow." The "spring rise" refers to extremely high flows in late spring resulting from the spring thaw. According to the 2000 BiOp, the spring rise provided a biological spawning cue for the pallid sturgeon and enabled the river to capture protein-rich nutrients from the floodplain and from wetland habitat not connected to the river channel during other seasons. In concert with the summer low flow, the spring rise also provided seasonal connectivity to the off-channel wetland habitat, making calm, shallow pools available to the pallid sturgeon for spawning, nursery and feeding areas. Lower elements of the food chain also were forced to congregate in the remaining pools, providing easy summer feeding for the protected species. In addition, the spring rise scoured and flushed sandbars. When the now-sparsely-vegetated sandbars were exposed by the summer low flow, the resulting lack of

cover for concealed predators allowed terns and plovers to nest there safely.

n4 A river's "hydrograph" is the variation in water level at each point along its channel over the course of time.

The Corps' operation of the reservoir system, generally capturing water in the upstream reservoirs to eliminate spring flooding and releasing water throughout the summer and fall as necessary to enable downstream navigation and restore reservoir capacity for the following spring, eliminated the spring rise and summer low flow from the hydrograph. The Reasonable and Prudent Alternative included with the 2000 BiOp ("2000 BiOp RPA") stated that "higher spring and lower or declining summer flows than now exist" n5 were "an integral component of the measures to avoid jeopardy" to the three protected species. The 2000 BiOp RPA also mandated habitat restoration, a comprehensive species and habitat monitoring program, and an adaptive management framework to "implement, evaluate, and modify the components of the RPA in response to variable river conditions, species responses, and increasing knowledge base."

n5 The 2000 BiOp presented data from Corps models showing that, with the reservoirs and channel improvements in place, the "natural hydrograph" today would be expected to produce a spring rise of 80 Kcfs (Kcfs = thousand cubic feet per second) and a summer low flow of 10 Kcfs at the Gavin's Point Dam, the final reservoir release point into the lower river. Under the 1979 Master Manual, flow at that point was typically maintained steadily between 30-35 Kcfs from March through November. The 2000 BiOp RPA called instead for a spring rise from Gavin's Point totaling 50-55 Kcfs to be implemented about once every three years, and an annual summer low flow of 25 Kcfs, ramped down to 21 Kcfs from mid-July through mid-August. The flow required for minimum support of downstream navigation is about

28.5 Kcfs, depending upon the accompanying inflow from downstream tributaries.

In an attempt to support downstream water-use interests despite the continuing drought in the basin, the Corps released a draft Annual Operating Plan for 2003 that did not incorporate the flow changes from the 2000 BiOp RPA. Environmental interest groups filed suit under the ESA in the United States District Court for the District of Columbia to enjoin operations under that plan. At the Corps' request, the FWS then issued a supplemental biological opinion ("the 2003 Supplemental BiOp") that ratified the Corps' plan to avoid the 2000 BiOp RPA flows for the period of May 1 through August 15, 2003, with the understanding that operations after 2003 would be consistent with the 2000 BiOp. Before the district court, however, the Corps revealed that it had no intention of ensuring that its future operations would so comply. *Am. Rivers v. United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 253 (D.D.C. 2003). In addition, the district court held that it was improper for the FWS to focus on the effects that the proposed action would have on the protected species during 2003 only, rather than on all future effects of the proposed action, and that the 2003 Supplemental BiOp failed to articulate a reasonable explanation for its departure from the analysis in the 2000 BiOp. *Id.* at 254-57. Therefore, the district court granted the injunction and ordered the Corps to comply with the summer low flow provisions of the 2000 BiOp. *Id.* at 263. Citing a conflict with this Court's *Ubbelohde* holding that required operation consistent with the 1979 Master Manual, the Corps initially failed to comply with the injunction and was held in conditional contempt. *See Am. Rivers v. United States Army Corps of Eng'rs*, 274 F. Supp. 2d 62 (D.D.C. 2003). Two days later, the Federal Judicial Panel on Multi-District Litigation consolidated all litigation regarding the operation of the Missouri River main stem reservoir system, including new suits by the parties involved in *Ubbelohde*, in the

District of Minnesota ("MDL court"). On the order of that court, the Corps complied with the summer low flow provisions of the 2000 BiOp RPA for the brief remainder of the 2003 summer period.

At that point, the Corps prepared a new Biological Assessment with the goal of finding a way to avoid jeopardy to the protected species without following the 2000 BiOp RPA flow requirements. In the fall of 2003, the Corps presented the new Biological Assessment to the FWS and requested a new Biological Opinion. In response, the FWS issued an Amendment to the 2000 BiOp ("the 2003 Amended BiOp"). The 2003 Amended BiOp RPA permitted the Corps to avoid the summer low flow requirement on the condition that it construct 1,200 additional acres of shallow water habitat for the pallid sturgeon. In addition, it gave the Corps two more years to experiment with alternatives to a spring rise. If the Corps could not produce an acceptable alternative plan, the RPA imposed a default spring rise of reduced magnitude beginning in the spring of 2006.

The Corps continued to develop the 2004 Master Manual by complying with the provisions of the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. § § 4321 *et seq.* NEPA requires the preparation of a detailed Environmental Impact Statement ("EIS") for every major federal action that will significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). The EIS must also evaluate alternatives to the proposed action. *Id.* In this case, the Corps compared five potential water control plans in its EIS before adopting the Preferred Alternative, a plan consistent with the 2003 Amended BiOp, as the basis for the 2004 Master Manual. The MDL court truncated the NEPA public-comment-and-review period and ordered all plaintiffs in this litigation to amend their complaints to address the 2004 Master Manual and 2004 Annual Operating Plan.

After the issuance of the 2004 Master Manual and 2004 Annual Operating Plan, various parties filed motions for



summary judgment. The district court granted summary judgment to the Federal Defendants on all claims on the bases that (1) the FCA does not create a non-discretionary duty in the Corps to maintain minimum navigation flows or a minimum length for the navigation season, and (2) the discretionary decisions made by the Federal Defendants in balancing water-use interests under the FCA and in avoiding jeopardy to the protected species were not arbitrary and capricious.

The parties now make various arguments on appeal. The states of Missouri and Nebraska and the Nebraska Public Power District ("NPPD") argue that the 2004 Master Manual violates a non-discretionary duty of the Corps under the FCA to maintain river flow sufficient to support uninterrupted downstream navigation throughout the navigation season. Nebraska and NPPD also argue that the 2003 Amended BiOp is in conflict with the purported FCA minimum-flow requirement, while Missouri argues that the 2003 Amended BiOp violates the ESA because it will eliminate some pallid sturgeon habitat in the lower Missouri River. American Rivers, the National Wildlife Federation, several state Wildlife Federations and the Izaak Walton League of America (collectively "American Rivers") argue that the 2003 Amended BiOp is arbitrary and capricious because it does not insure against jeopardy to the three protected species. In addition, American Rivers contends that the EIS was faulty because the Corps failed to explain why the Preferred Alternative was superior to another evaluated alternative. Blaske Marine, ConocoPhillips Company, Ergon Asphalt & Emulsions, Inc., Magnolia Marine Transport Company, Midwest Terminal Warehouse Company, Inc., MO-ARK Association and Missouri River Keepers (collectively "Blaske Marine") argue that a supplemental EIS is required for a contingent summer low flow that the Corps still has the discretion to implement. Finally, the Mandan, Hidasta and Arikara Nation ("the Nation") contends that the

Corps must operate Lake Sakakawea (Garrison Dam) for the economic benefit of the Nation's members.

## II. DISCUSSION

"We review de novo a grant of summary judgment, applying the same legal standards used by the district court." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004). We review the actions of the Corps and FWS under the *Administrative Procedure Act* "to determine whether they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" n6 *Ubbelohde*, 330 F.3d at 1027 (quoting 5 U.S.C. § 706(2)(A)). An arbitrary and capricious action is one in which:

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Cent. S.D. Coop. Grazing Dist. v. Sec'y of the United States Dep't. of Agric.*, 266 F.3d 889, 894 (8th Cir. 2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). "If an agency's determination is supportable on any rational basis, we must uphold it." *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763. "When the resolution of the dispute involves primarily issues of fact and analysis of the relevant information 'requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.'" *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989)).

n6 Nebraska and NPPD argue that the Corps has attempted to evade judicial review under the Administrative Procedure Act by stating in a letter that it did not intend for the 2004 Master Manual to be considered a binding regulation. We established in *Ubbelohde* that the 1979 Master Manual was binding and subject to judicial review. 330 F.3d at 1027-30. The Corps has conceded, both in district court and in its briefs on appeal, that the 2004 Master Manual is still binding on the Corps and subject to judicial review.

#### **A. The Corps' FCA Duty to Support Downstream Navigation**

Missouri, Nebraska and NPPD (collectively "the downstream parties") argue that the 2004 Master Manual is not in accordance with law because, under certain drought conditions, it calls for canceling the navigation season in order to hold water in the reservoirs for the benefit of recreation. The MDL court concluded that the FCA imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests. We agree.

This Court has already addressed thoroughly the balance of interests under the FCA. In *Ubbelohde*, we relied on the Supreme Court's decision in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 98 L. Ed. 2d 898, 108 S. Ct. 805 (1988), and the legislative history of the FCA to determine that "the dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation," while "the Act recognizes secondary uses of the River including irrigation, recreation, fish, and wildlife." *Ubbelohde*, 330 F.3d at 1019-20. However, the FCA does not set forth what level of river flow or length of navigation season is required to make navigation "dominant" over a "secondary" interest such as recreation. Instead, "the courts can review the Corps's decisions to ensure that it considered

each of these interests before making a decision," but "the Act does not provide . . . a method of deciding whether the balance actually struck by the Corps in a given case is correct or not." *Id.* at 1027.

The downstream parties challenge the provisions of the 2004 Master Manual referred to as "navigation precludes." The amount of water stored in the entire reservoir system is checked on March 15 and July 1 of each year. If total system storage falls below the "volumes . . . that allow the System to function to meet authorized purposes during significant multi-year drought periods," navigation support is reduced or eliminated for that year. 2004 Master Manual § 7-03. The EIS estimates, based on the modeling of historical data from 1898 to 1997, that the selected navigation-preclude volumes will lead to the elimination of the entire navigation season only in the four worst drought years out of every one hundred years, and to a navigation season shortened from eight-plus months to less than seven months only in the eight worst drought years out of every one hundred. Under these circumstances, we cannot say that the Corps failed to consider downstream navigation before making its decision.

n7

n7 The Corps states in § 7-01 of the 2004 Master Manual that in the FCA, "Congress did not assign a priority to these purposes" of "flood control, navigation, irrigation, hydropower, . . . recreation, and fish and wildlife. . . ." To the contrary, as we clearly stated in *Ubbelohde*, the FCA has been interpreted to hold flood control and navigation dominant and recreation, fish and wildlife secondary. *Ubbelohde*, 330 F.3d at 1019-20. If, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish and wildlife on the other, the priorities established by the FCA would forbid the abandonment of flood control or navigation. While we hold today that the 2004 Master Manual does not "abandon"

navigation, we do not rule out the possibility that some more limited degree of support for flood control or navigation in the future could be held to constitute "abandonment" of these dominant functions. *See also infra* note 9.

Appellees North Dakota and South Dakota argue that because damage to the recreation industry would have a more dramatic negative economic impact than would damage to the navigation industry, recreation should receive special priority. Nothing in the text or legislative history of the FCA suggests that Congress intended the priority of interests under the FCA to shift according to their relative economic value. Arguments based on the wisdom of the priorities established by the FCA must be addressed to Congress. n8

n8 Appellee South Dakota also argues that the O'Mahoney-Millikin Amendment, 33 U.S.C. § 701-1(b), prioritizes the retention of water in the reservoirs over downstream navigation. The MDL court granted summary judgment against South Dakota on this issue, and South Dakota did not appeal. We, therefore, construe South Dakota's argument in opposition to the appellant downstream parties to be that the *O'Mahoney-Millikin Amendment* would forbid, for the purposes of supporting navigation, any further lowering of the navigation-preclude volumes beyond those implemented in the 2004 Master Manual. Because we find against the appellant downstream parties on this issue on other grounds, we need not address appellee South Dakota's argument.

The Corps' balancing of water-use interests in the 2004 Master Manual is in accordance with the FCA. Because the 2004 Master Manual does not evidence a failure to consider the support of downstream navigation, it is not arbitrary and capricious. Therefore, we affirm the grant of summary judgment to the Corps on this claim.



## **B. The Corps' Duty to Consult with the FWS under ESA § 7**

Nebraska and NPPD argue that it was not in accordance with law for the Corps to engage in the ESA § 7 consultation process with the FWS regarding the operation of the reservoir system. They contend that the ESA does not apply to the operation of the reservoir system because ESA compliance would interfere with downstream navigation, a project purpose that is mandated by statute such that the Corps has no discretion in meeting it. See 50 C.F.R. § 402.03 ("Section 7 [of the ESA] and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.") (emphasis added).

Case law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority. For example, in *National Wildlife Federation v. United States Army Corps of Engineers*, 384 F.3d 1163 (9th Cir. 2004), the Ninth Circuit held that the Corps' operation of four dams on the Snake River did not violate the *Clean Water Act*. The challenged noncompliance with water standards was caused by "the existence of the dams and not any discretionary method of operating the dams," and the Clean Water Act could not be construed to supersede "the Corps's operation of the dams consistent with the purposes stated by Congress." *Id.* at 1178-79.

Similarly, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 295 U.S. App. D.C. 218, 962 F.2d 27 (D.C. Cir. 1992), the Federal Energy Regulatory Commission (FERC) was authorized by statute to issue annual licenses to hydropower providers on the Platte River. The enabling statute forbade alteration of the terms of an annual license without agreement from the licensee. Environmental groups sued FERC, arguing that the ESA required the imposition of wildlife-protection terms in the

licenses. The court held that the ESA did not apply to the licenses because the ESA did not authorize FERC to override the statutory prohibition on altering the licenses. *Id.* at 32-34. In effect, *Platte River Whooping Crane* affirmed that the ESA does not apply where an agency has no statutory authority to act with discretion.

Cases such as *National Wildlife Federation* and *Platte River Whooping Crane* are inapposite to the instant case, however, because compliance with the ESA does not prevent the Corps from meeting its statutory duty under the FCA to support downstream navigation. As we stated above, the FCA does not mandate a particular level of river flow or length of navigation season, but rather allows the Corps to decide how best to support the primary interest of navigation in balance with other interests. The 2004 Master Manual demonstrates that the Corps can comply with the elements of the 2003 Amended BiOp RPA while continuing to operate the dams "consistent with the purposes stated by Congress" in the FCA. n9 *Nat'l Wildlife Fed'n*, 384 F.3d at 1179.

n9 It follows that if future circumstances should arise in which ESA compliance would force the Corps to abandon the dominant FCA purposes of flood control or downstream navigation, the ESA would not apply. *See supra* note 7.

Because the Corps is able to exercise its discretion in determining how best to fulfill the purposes of the reservoir system's enabling statute, the operation of the reservoir system is subject to the requirements of the ESA. It was therefore in accordance with law for the Corps to consult with the FWS to produce the 2003 Amended BiOp. We affirm the grant of summary judgment to the Federal Defendants on this claim.

### **C. Mootness of Claims Based on Summer Low Flow**

Several of the claims against the Federal Defendants challenge the conditional summer low flow element of the 2003 Amended BiOp RPA. The Federal Defendants argue

that these claims are now moot because the Corps has successfully completed the mechanical construction of 1,200 acres of shallow water habitat, which permits the Corps to avoid the summer low flow requirement. n10 The Corps has announced that it has no plans to implement summer low flows in the foreseeable future. Missouri, NPPD and Blaske Marine counter that because the Corps retains the discretion to implement the summer low flow in any given year under its adaptive management framework, these claims fall within the "capable of repetition, yet evading review" exception to mootness. *Ubbelohde*, 330 F.3d at 1023 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 46 L. Ed. 2d 350, 96 S. Ct. 347 (1975)).

n10 American Rivers has challenged the successful completion of the 1,200 acres in the MDL court. The MDL court dismissed the suit without prejudice for procedural reasons. That dismissal has been separately appealed to this Court, Docket No. 05-1200, and is still pending.

We conclude that the claims based on summer low flow are moot. The "capable of repetition, yet evading review" exception "applies when two conditions are met: '(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 17, 140 L. Ed. 2d 43, 118 S. Ct. 978 (1998)).

In this case, it appears that the 30-day duration of a summer low flow period, particularly if it is implemented with little prior warning, is too short to be fully litigated prior to expiration. However, there is no reasonable expectation that the Corps will implement the 2003 Amended BiOp summer low flow in the future. Although a "party need not show with certainty that the situation will recur," a "speculative possibility is not a basis for retaining

jurisdiction over a moot case." *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1036 (8th Cir. 2004) (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547 (8th Cir. 1995)). We are aware that the 2003 Amended BiOp requires the Corps to be ready to implement summer low flows as low as 21 Kcfs in the future if monitoring reveals that the alternate measures are not benefitting the protected species as expected. Nevertheless, as we discuss later in this opinion, at this point there is no reason to doubt the utility of those alternate measures. Therefore, "we find nothing to suggest a likelihood" that the Corps will decide to implement a summer low flow in future years. *McCarthy*, 359 F.3d at 1036.

Because there is no reasonable expectation at this point in time that the Corps will implement the 2003 Amended BiOp summer low flow in the future, we conclude that the following claims are moot: (1) NPPD's claim that the FWS failed to consider the economic feasibility of the summer low flow requirement in developing the 2003 Amended BiOp; (2) Missouri's claim that the loss of shallow water habitat for larval and juvenile pallid sturgeon in central Missouri state resulting from summer low flow constitutes an impermissible "take" of the sturgeon under *ESA* § 9; and (3) Blaske Marine's NEPA claim that a supplemental EIS is required for the 2003 Amended BiOp summer low-flow requirement. We vacate the MDL court's grant of summary judgment to the Federal Defendants on these claims and instruct the MDL court to dismiss these claims without prejudice.

#### **D. The Validity of the 2003 Amended BiOp**

NPPD argues that the 2003 Amended BiOp is invalid because the FWS violated regulations applicable to Biological Opinions. American Rivers challenges the 2003 Amended BiOp on the grounds that the 2003 Amended BiOp RPA contradicts its own factual findings and the administrative record and does not insure against jeopardy to the protected species.

*1. The Environmental Baseline for the 2003 Amended BiOp*

NPPD contends that the FWS used an improper environmental baseline in producing the 2003 Amended BiOp. "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area . . . ." 50 C.F.R. § 402.02. Jeopardy to the protected species resulting from the proposed action is measured relative to the species' status under the baseline. *Id.* The FWS used a "run-of-the-river" baseline in which the dams and physical channel modifications are assumed to be in place, but all floodgates are assumed to be wide open, with no flow control. NPPD argues that normal operation under the 1979 Master Manual was the proper baseline because it is a "past impact" of a separate federal action and would continue to control operations absent the proposed action. Because continued operation under the 1979 Master Manual would cause the protected species' chances of recovery to deteriorate, its inclusion in the baseline would tend to eliminate a finding of jeopardy for any proposed action.

According due deference to the FWS' interpretation of its own regulations, *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1121, we agree with the FWS that hypothetical continued operation under the previous version of the Master Manual in future years, as the alternative to the proposed action of updating the Master Manual, does not in any sense constitute a "past impact" of federal action. As the district court recognized, this argument is essentially a different twist on the argument that the Corps has no discretion in operating the reservoir system. If the FCA mandated that the Corps must manage the system to enable, for example, a barge of specific size riding a specific depth below the waterline to navigate the river between Sioux City and the Mississippi River at all times between April 1 and December 1, there would be some merit to including that

non-discretionary condition in the environmental baseline along with the permanent physical presence of the dams and channel modifications. However, given that the FCA "clearly gives a good deal of discretion to the Corps in the management of the River," *Ubbelohde*, 330 F.3d at 1027, we cannot say that it was arbitrary and capricious for the FWS not to include a specific operational profile in the environmental baseline. Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

## *2. Use of the Best Scientific and Commercial Data Available*

NPPD argues that the FWS did not rely on the best scientific data available in its efforts to create a "normalized" hydrograph in the 2003 Amended BiOp RPA. "In formulating its biological opinion, [and] any reasonable and prudent alternatives . . . the [FWS] will use the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8); see 16 U.S.C. § 1536(a)(2).

To create a normalized version of the summer low flow portion of the natural hydrograph, the 2003 Amended BiOp calls for low flows beginning in July. NPPD directs our attention to a United States Geological Survey report in the administrative record showing that, before construction of the dams, the lowest summer flows usually occurred between August and early October. NPPD contends that this incongruity evidences a failure to use the best scientific data available to formulate the 2003 Amended BiOp.

The administrative record as a whole shows that the FWS did not ignore the best scientific data on the summer low flow in formulating the 2003 Amended BiOp. For example, in a document e-mailed by the FWS to new members of the 2003 Amended BiOp development team in November 2003, the FWS recognized that "the historic hydrograph began to fall at Gavins Point in mid-June and reached it's [sic] lowest levels in the fall months," but indicated that the FWS



proposal would end the low flow period in August because higher releases in the fall were necessary "to evacuate any excess water [from the reservoirs] prior to the next water year." The FWS then stated that, "while this approach is not a perfect fit to the historic hydrograph, we believe that it sufficiently mimics . . . the natural hydrograph" to have the necessary beneficial effect on the protected species.

The FWS has never found that an exact replication of the natural hydrograph was necessary to avoid jeopardy to the protected species, and the record shows "a rational connection between the facts found and the decision made" about the timing of the low flow period. *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004). Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

### *3. The Consistency of the 2003 Amended BiOp Factual Findings and the RPA for the Pallid Sturgeon*

American Rivers argues, on the basis of the factual findings in the 2003 Amended BiOp and the administrative record underlying it, that the conditional replacement of the 2000 BiOp RPA summer low flow requirement with the mechanical construction of 1,200 additional acres of artificial shallow water habitat for the pallid sturgeon is arbitrary and capricious.

The 2003 Amended BiOp incorporated findings from the 2000 BiOp and stated that "until a semblance of the normalized hydrograph is restored and habitat is generated and maintained through re-establishment of these [ecological] processes, listed species will continue to decline." In addition, the executive summary of the 2003 Amended BiOp summarizes, with regard to the pallid sturgeon:

The proposed accelerated habitat restoration program in the Lower Missouri River will have little benefit to the pallid sturgeon without a concurrent or subsequent change in operations to provide a more normalized hydrograph to (1) provide the spawning cues that are critical for pallid sturgeon reproduction and (2) allow larvae and juveniles to move into shallow water habitat.

American Rivers contends that the above statements, and others like them in the administrative record, show that the FWS was irrational in abandoning any semblance of half of the natural hydrograph, the summer low flow, in exchange solely for habitat construction. However, evidence in the record adequately explains the decision made by the FWS. First, Appendix A of the Corps' 2003 Biological Assessment, entitled "New Information Since the 2000 BiOp," includes the results of extensive modeling of the river showing that the proposed 2000 BiOp summer low flow would be expected to increase suitable shallow water habitat by 1,189 acres over that existing during regular summer service flows. The creation of 1,200 acres of habitat, therefore, provides the same total acreage of accessible calm, shallow pools during regular summer service flows as the 2000 BiOp summer low flow would have produced. Second, the 2003 Amended BiOp RPA retains a spring rise requirement, and the Corps must tailor the spring rise to provide the necessary biological spawning cues and floodplain connectivity with the shallow water habitat. Third, the 2003 Amended BiOp RPA requires the Corps to monitor the pallid sturgeon population and collaborate with the FWS to adjust these measures if necessary. Finally, the avoidance of summer low flow preserves the existing Lisbon chute shallow water habitat, the only site in the river where larval pallid sturgeon occur naturally, from potential damage.

American Rivers argues that the 2003 Amended BiOp did not state that the mechanical construction of 1,200 acres

was designed to replace the additional acreage that would have resulted from summer low flow. American Rivers contends that this rationale is therefore an impermissible post hoc rationalization by counsel. "Courts may not accept appellate counsel's post hoc rationalizations for agency action." *Motor Vehicle Mfrs.*, 463 U.S. at 50. However, there is no requirement that every detail of the agency's decision be stated expressly in the 2003 Amended BiOp. The rationale is present in the administrative record underlying the document, and this is all that is required. *Mo. Coalition for the Env't v. Corps of Eng'rs of the United States Army*, 866 F.2d 1025, 1031 (8th Cir. 1989), overruled on other grounds, *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990). Therefore, the Federal Defendants' rationale is not an impermissible post hoc rationalization.

We conclude that the Federal Defendants have demonstrated a rational connection between the facts in the record and the decision to substitute 1,200 mechanically constructed acres of shallow water habitat for the 1,189 acres that would have been created by the 2000 BiOp summer low flow. Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

#### *4. The Consistency of the 2003 Amended BiOp Factual Findings and the RPA for the Least Tern and Piping Plover*

American Rivers argues that the elimination of the 2000 BiOp RPA spring rise and summer low flow requirements for the benefit of the least tern and piping plover is arbitrary and capricious. The 2000 BiOp flow requirements for the tern and plover were premised on factual findings that a spring rise was necessary to scour vegetation from sandbars, while the summer low flow would expose the resulting sparsely vegetated sandbars for safe nesting. The 2003 Amended BiOp RPA replaced the spring rise and summer low flow requirements with increased focus on the mechanical

construction and clearing of sandbar habitat for the birds and adjustment of flow levels during the nesting season to minimize the potential for flooding nests.

In making these changes in the 2003 Amended BiOp, the FWS had the benefit of a new Corps analysis of the river's geomorphological processes. The Corps' computer models indicated that, given the man-made alterations to the river channel, a spring rise as envisioned in the 2000 BiOp would not produce scoured sandbar habitat for use by the tern and plover. In fact, the models showed that those flows were more likely to reduce the quality of previously available habitat.

The 2003 Amended BiOp also included information about tern and plover populations that was not available for the 2000 BiOp. The updated information included the fact that "recent counts of least terns (approximately 12,305 terns in 2003) exceed the overall recovery objective of 7,000 birds," although geographic distribution and population stability goals were not yet satisfied. Regarding the recovery goal for piping plovers, the 2003 Amended BiOp stated that "in 2001, the Missouri River exceeded this recovery goal for the first time. It was also exceeded in 2002 and 2003."

Based on this new information, it was rational for the FWS to conclude that the 2000 BiOp spring rise and summer low flow elements were not necessary to avoid jeopardy to the tern and plover, and to instruct the Corps to focus its resources on the mechanical construction of habitat, monitoring and adaptive management.

American Rivers cites the lack of conclusive proof in the administrative record that the mechanically constructed sandbars will develop into an ecologically functional habitat for the plover and tern. American Rivers contends that, without such conclusive proof, the 2003 Amended BiOp RPA fails to satisfy the *ESA* § 7 requirement that the plan "insure" against jeopardy to the listed species. This argument

fails because, while the proposed mitigation measures must insure against jeopardy to the protected species if they work as intended, while there must be a rational reason to expect them to work as intended, and while they must in fact be possible to implement, there is no requirement for the FWS to ensure the overall success of the plan. See *Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 523-24 (9th Cir. 1998). We also note that the 2003 Amended BiOp requires the Corps to monitor closely the performance of the mechanically constructed sandbar habitat and test methods of improving the mix of organic material in the sandbars.

Finally, American Rivers cites its own experts for the contention that the higher-magnitude 2000 BiOp RPA spring rise would be more beneficial to the protected species than the default spring rise in the 2003 Amended BiOp RPA. We need not address that contention:

[The FWS] was not required to pick the first reasonable alternative [it] came up with in formulating the RPA. [It] was not even required to pick the best alternative or the one that would most effectively protect the [species] from jeopardy. The [FWS] need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency.

*Southwest Ctr. for Biological Diversity*, 143 F.3d at 523 (quotation omitted).

"Because there was a rational connection between the facts found in the [BiOp] and the choice made to adopt the final RPA, and because we must defer to the special expertise of the FWS in drafting RPAs that will sufficiently protect endangered species," the decision to eliminate the 2000 BiOp flow changes from the 2003 Amended BiOp RPA for the

plover and tern was not arbitrary and capricious. *Id.* We affirm the grant of summary judgment to the Federal Defendants on this claim.

### **E. Selection of the Preferred Alternative in the EIS**

American Rivers argues that the Corps' selection of the Preferred Alternative ("PA") was arbitrary and capricious because the Corps did not sufficiently explain why the PA was superior to plan GP2021, favored by American Rivers. Plan GP2021 included the spring rise and summer low flow prescribed by the 2000 BiOp RPA, while the PA became the 2004 Master Manual.

The EIS contains summary statements about the selection of the PA, such as:

The Corps believes that the PA, when combined with the other measures . . . , conserves more water in the upper three lakes during extended droughts, meets the needs of ESA-listed fish and wildlife species, is consistent with the Corps' responsibilities under environmental laws and tribal trust responsibilities, and provides for the Congressionally authorized uses of the System.

American Rivers argues that because plan GP2021 also generally meets those same criteria and outperforms the PA with respect to wildlife concerns, the Corps' decision to select the PA has not been sufficiently explained. "An agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs.*, 463 U.S. at 48.

NEPA requires an agency to present the EIS alternatives in comparative form, "sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public." 40 C.F.R. § 1502.14. In this case, the EIS included a detailed comparative analysis of the effects of all five alternatives on a wide range of interests



including fish and wildlife resources, flood control, water supply, hydropower, recreation and navigation. This analysis, presented in a series of tables, enables the reader to compare the relative effectiveness of each of the alternatives, as required by NEPA. For example, the Federal Defendants point to tables showing the strong superiority of the PA over plan GP2021 in maximizing summer revenue from reservoir hydropower production while creating far less risk of disruption for downstream summer power generation. The tables also show that the PA outperforms plan GP2021 in the areas of navigation, groundwater damage and floodplain crop damage. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989).

Contrary to what *American Rivers* seems to suggest, there is no further NEPA or Administrative Procedure Act requirement to repackage the information in the summary tables into prose one-to-one comparisons of the PA with each of the other alternatives. We conclude that the comparisons provided in the EIS "cogently explain why[the Corps] has exercised its discretion in a given manner." *Motor Vehicle Mfrs.*, 463 U.S. at 48. Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

#### **F. Claim of the Mandan, Hidasta and Arikara Nation Regarding the Management of Lake Sakakawea**

The Nation claims that the Corps has failed to choose the FCA-and ESA-compliant reservoir management plan that best spurs economic self-sufficiency for the Nation's members and protects the Nation's cultural resources. The Nation seeks a court order to enjoin the Corps to correct these "deficiencies." The MDL court dismissed the Nation's claim for lack of Article III standing.

To show Article III standing, a plaintiff must demonstrate (1) an "injury in fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood, as opposed to mere speculation, "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (quotations omitted).

The Nation articulates its members' general interest in the operation of Lake Sakakawea, including an interest in the economic health of the sport fishing industry located there. However, the Nation does not articulate how reservoir operations under the 2004 Master Manual cause an injury to the Nation that can be redressed by a favorable court decision. There is nothing in the amended complaint, for example, stating why reservoir operation under the 2004 Master Manual, which is more sensitive to reservoir recreation needs during prolonged droughts than was the 1979 Master Manual, will damage the viability of Lake Sakakawea's sport-fishing industry. Furthermore, if we were to do exactly as the Nation requests in its amended complaint and order the Corps to re-formulate the 2004 Master Manual in a manner that, given FCA and ESA constraints, would best "spur Tribal self sufficiency and economic development and protect Indian trust assets," it is not at all clear what outcome could be adjudged to comply with our order. The Nation simply has not set forth a "concrete and particularized" injury that is likely to be redressed by such an order. *Lujan*, 504 U.S. at 560-61. Therefore, we affirm the dismissal of this claim for lack of Article III standing.

#### **G. Extra-Record Materials Offered by American Rivers**

Nebraska challenges the submission of three declarations by American Rivers that were not part of the administrative record. The MDL court apparently considered Nebraska's

motions to strike these declarations to be moot. Because we affirm the grant of summary judgment to the Federal Defendants on American Rivers' claims, we also find Nebraska's motions to strike to be moot.

### III. CONCLUSION

On the following three claims, we vacate the MDL court's grant of summary judgment to the Federal Defendants and instruct the MDL court to dismiss without prejudice: (1) NPPD's claim that the FWS failed to consider the economic feasibility of the summer low-flow requirement in developing the 2003 Amended BiOp; (2) Missouri's claim that the loss of shallow water habitat for larval and juvenile pallid sturgeon in central Missouri resulting from summer low flow constitutes an impermissible "take" of the sturgeon under *ESA* § 9; and (3) Blaske Marine's NEPA claim that a supplemental EIS is required for the 2003 Amended BiOp summer low-flow requirement. On all other claims, we affirm the judgment of the MDL court.

**In re: Operation of the Missouri River System  
Litigation**

**03-MD-1555 (PAM)**

**UNITED STATES DISTRICT  
COURT FOR THE DISTRICT  
OF MINNESOTA**

*363 F. Supp. 2d 1145; 2004  
U.S. Dist. LEXIS 11410*

**June 21, 2004, Decided**

**OPINION BY: Paul A. Magnuson**

**MEMORANDUM AND ORDER**

This matter is before the Court on various Motions for Summary Judgment. This case arises out of the management of the Missouri River, which flows from Montana to Missouri. Pursuant to the *Flood Control Act of 1944* ("FCA"), the United States Army Corps of Engineers ("Corps") manages the river and its reservoirs. In conjunction with its responsibilities under the FCA, the Corps developed a more detailed management plan, the "Missouri River Main Stem Reservoir System Master Water Control Manual" ("Master Manual"). The Master Manual was first developed forty years ago, and has been revised three times, in 1973, 1975 and 1979. In the late 1980s, the Corps began to revise the Master Manual again. Finally, after fifteen years and repeated delays, the Corps issued a revised Master Manual on March 19, 2004. n1 The Corps also issued the 2004 Annual Operating Plan ("AOP") on March 19, 2004.

n1 Revision of the Master Manual is an extensive and lengthy process that requires the Corps to consult with various agencies and comply with various regulations and procedures. Prior to the issue of the new Master Manual, the Corps must issue a Final Environmental Impact Statement ("Final EIS"), and allow 30 days for public review and comment as required by the *National Environmental Policy Act* ("NEPA"). Here, the Court shortened the NEPA review period to two weeks and required the Corps to issue a revised Master Manual on March 19, 2004. On March 1, 2004, the Corps requested a waiver of the NEPA review period, which the Environmental Protection Agency ("EPA") granted "for compelling reasons of national policy." From the outset, the Court refuses to entertain any Motions attacking the sufficiency of the NEPA review period and dismisses all claims pertaining to this issue.

Over the last several years, the Missouri River has experienced prolonged drought conditions. The Corps has been forced to make difficult decisions regarding the allocation of water to the different interests in the basin. As a result, interested parties filed lawsuits in various districts, seeking to protect their interests. See *American Rivers v. U.S. Army Corps of Eng'rs*, File No. 1:03-241 (D.D.C.); *Nebraska v. Ubbelohde*, 8:02-217 (D. Neb.); *Blaske Marine, Inc. et al. v. Norton*, File No. 8:03-142 (D. Neb.); *North Dakota v. Ubbelohde*, File No. 1:02-59 (D. N.D.); *South Dakota v. Ubbelohde*, File No. 3:02-3011 (D. S.D.). In July 2003, the multi-district litigation panel consolidated these actions and transferred them to this Court. In *re Operation of the Missouri River Litig.*, File No. 03-1555 (PAM). Pursuant to the Court's scheduling order and as a result of the coordinated efforts of the parties, the issues presented in these various cases are now before this Court. This Memorandum and Order disposes of all claims before the Court.

## BACKGROUND

### **A. The Parties**

The parties involved in this action include: (1) the states of North Dakota, South Dakota, Montana, Nebraska, and Missouri; (2) Blaske Marine, Coalition to Protect the Missouri River, ConopcoPhillips Company, Ergon Asphalt & Emulsions, Inc., Magnolia Marine Transport Company, Midwest Area River Coalition 2000, and Midwest Terminal Warehouse Company, Inc. (collectively "Blaske Marine"); (3) MO-ARK Association and Missouri River Keepers (collectively "MO-ARK"); (4) American Rivers, Environmental Defense, National Wildlife Federation, various state Wildlife Federations, and Izaak Walton League of America (collectively "American Rivers"); (5) Missouri River Energy Services ("MRES"); (6) Nebraska Public Power District ("NPPD"); (7) the Mandan, Hidasta and Arikara Nation ("the Nation"); and (8) the Corps, Fish and Wildlife Service ("FWS"), and various directors, secretaries and officers of these two government agencies (collectively "Federal Defendants"). Because of their competing interests, it is difficult to classify each party as a Plaintiff, Defendant, or both. Rather, the claims can be categorized into four different topics: (1) Flood Control Act ("FCA") claims; (2) *Endangered Species Act* ("ESA") claims; (3) NEPA claims; and (4) collateral claims. The Court will address each topic in turn.

### **B. The Revision of the Master Manual**

In 1990, pursuant to the Endangered Species Act ("ESA"), the Corps conducted its first consultation with the FWS on the effects of its Missouri River operations on endangered and threatened species. n2 In 2000, the Corps again consulted with the FWS. Following these consultations, the FWS issued the 2000 Biological Opinion ("2000 BiOp"), that concluded that the Corps' proposed river operations for 2000 were likely to jeopardize three species:



the endangered least tern, the threatened piping plover, and the endangered pallid sturgeon. (Fish and Wildlife Service Administrative Record ("FWS AR") 1237 at 29216-17.) The 2000 BiOp included a Reasonable and Prudent Alternative ("RPA"), designed to avoid jeopardy to the tern, plover and sturgeon. Specifically, this RPA recommended a spring rise and low summer water flow regime, in conjunction with habitat construction, to avoid jeopardy. (Id. at 29229-32.)

n2 An endangered species is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

In April 2003, the Corps consulted with the FWS again on the Corps' proposed operations for 2003. The FWS then issued a supplemental Biological Opinion, concluding that although the proposed operations for 2003 deviated from the RPA in the 2000 BiOp, the proposed operations were justified. The District Court of the District of Columbia disagreed, and granted a preliminary injunction ordering the Corps to comply with the 2000 BiOp. See *American Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230 (D.D.C. 2003). In November 2003, the Corps again consulted with the FWS. The FWS then amended the 2000 BiOp. (2003 Amended Biological Opinion (hereinafter "2003 Amended BiOp") at FWS AR 1457.) The FWS again concluded that jeopardy would result to the plover, tern and the sturgeon, and proposed a new RPA. The 2003 RPA contained three separate parts, each part applicable to a single species.

As noted above, the Corps issued the 2004 Master Manual on March 19, 2004. The 2004 Master Manual, along with the 2004 AOP, are based on the 2003 Amended BiOp. In accordance with NEPA, the Corps issued the Final EIS for the 2004 Master Manual on March 5, 2004. This Court

truncated the public comment and review period for the 2004 Master Manual. Therefore, on March 19, 2004, pursuant to Court Order, the Corps issued the 2004 AOP, 2004 Master Manual, and Record of Decision ("ROD"). The issues in this litigation involve both the substance of the 2004 Master Manual and the procedures the Corps used to formulate the 2004 Master Manual.

## DISCUSSION

This case involves the interplay of the Corps' obligations under the FCA, ESA and NEPA. The FCA authorizes the Corps to operate the Missouri River by balancing a variety of river interests. The ESA seeks to protect and conserve endangered and threatened species and their habitats. NEPA requires agencies to consider and evaluate the potential environmental consequences that may result from an agency action. The Corps must consider both competing river interests and its legal obligations in the operation of the Missouri River.

### A. The Flood Control Act of 1944

#### 1. Navigation and Flood Control

The FCA provides for the management of the Missouri River and its reservoirs. Pub. L. No. 78-534, 58 Stat. 887 (1944). The FCA is the product of the "Pick-Sloan" plan. The "Pick" Plan, submitted to Congress by the Corps, proposed the construction of reservoirs to effectively control flooding, but also acknowledged that "the development of such a comprehensive plan involves adjustment of many factors of flood control, navigation, irrigation, hydroelectric power production and numerous other functions of water conservation and management." H.R. Doc. No. 78-475 at 6 (1944). The "Pick" Plan did not rank any river interest above another, but rather seeks to provide the "widest range of multiple benefits" and "to contribute most significantly to the welfare and livelihood of the largest number of people." *Id.*

at 7. The "Sloan" Plan, submitted to Congress by the Bureau of Reclamation, proposed the construction of reservoirs "for the purposes of storing water, and releasing it during periods of low flow . . . such reservoirs will contribute to flood control . . . aid navigation . . . enlarge the supply of water available for irrigation . . . and . . . make practicable the generation of electrical energy." S. Doc. No. 78-191 at 18 (1944). The "Sloan" Plan does not dictate a priority of river interests, but rather seeks to provide a "basin-wide plan most likely to yield the greatest good to the greatest number of people." *Id.* at 17. The "Sloan" Plan declared that any plan for operation of the river must "recognize all beneficial uses of waters, weigh their relative values, and make a compromise, from a basin-wide viewpoint, in each instance of conflict." *Id.* at 21. These two plans combined to develop one plan for the river's operation, the "Pick-Sloan" Plan. S. Doc. No. 78-247 (1944). This "unified" plan was intended to "secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation" in the Missouri River. *Id.* at 5; see *id.* at 2.

Courts acknowledge that the "dominant" functions of the FCA include flood control and downstream navigation, but they also acknowledge that other river interests should similarly be provided for. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 98 L. Ed. 2d 898, 108 S. Ct. 805 (1988); see also *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019-20 (8th Cir. 2003). The Eighth Circuit acknowledged that the FCA requires that "the Corps must strike a balance among many interests, including flood control, navigation and recreation." *Ubbelohde*, 330 F.3d at 1019, 1027. The Corps' obligations under the ESA are within the scope of these "many interests." See *American Rivers*, 271 F. Supp. 2d at 252. Because of this balance, the Court may only review the Corps' actions to ensure that the Corps considered all river interests when formulating a given plan. *Id.* at 1027. The language of the FCA does not require a particular outcome, but rather that the Corps consider all interests in its

operations. *Id.* There is no language in either caselaw or legislative history that dictates that the Corps must always maintain a particular water level or specific water season in its river operations. All river interests must be considered and evaluated to "secure the maximum benefits" to river interests. The Court finds that the FCA does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths. The Corps' prioritization of river interests is discretionary.

However, the Corps is not entitled to abandon these interests; it must consider and balance river interests to achieve maximum benefits. Some parties propose that navigation is abandoned under the 2004 Master Manual, because in the event that by March 15 total system storage is below 31 million acre-feet, the 2004 Master Manual provides that flows be reduced such that the navigation season is eliminated for that particular water year. As the Corps points out, however, the FCA requires it to defer to upstream consumptive uses in the event these uses "conflict" with downstream navigation. See 33 U.S.C. § 701-1(b). In the rare event that this condition presents itself, the 2004 Master Manual's elimination of the navigation season ensures that upstream consumptive uses are given deference as required by law. The Court finds that the 2004 Master Manual complies with the FCA.

The priority that the Corps gives the competing river interests is a discretionary function, and subject to the ESA. If Congress intended to require that the Corps always maintain minimum levels of navigation or a specific navigation season, then Congress must amend the FCA accordingly. Absent any evidence to the contrary, the Court concludes that prioritization of river interests is discretionary.

## 2. Ambiguity of the Master Manual

Ubbelohde declared that the 1979 Master Manual limited the Corps' discretion to operate the Missouri River. 330 F.3d

at 1029. As a result, Ubbelohde found that judicial review of the Corps' decisions was appropriate. *Id.* In reaching that conclusion, the Eighth Circuit relied on a combination of three considerations: (1) the language of the manual itself; (2) the corresponding agency regulations at 33 C.F.R. § 222.5; and (3) the Corps' treatment of the manual. *Id.* (citing *Northwest Nat'l Bank v. Dep't of the Treasury*, 917 F.2d 1111, 1116-17 (8th Cir. 1990)). Unlike the 1979 Master Manual, the 2004 Master Manual expressly states that "the Master Manual has been amended to clearly reflect the Corps' intent that it not be considered a binding regulation." (2004 Master Manual, at Introduction.) The Corps essentially is attempting to reserve the right to vary operations from those set forth in the Master Manual, in the event that changed conditions or unforeseen circumstances require it to do so. The Corps insists that the FCA, its regulations, and the Ubbelohde decision permit it to retain such discretion in its operations. Missouri, Nebraska, and the NPPD insist that this discretion is expressly prohibited by Ubbelohde.

Missouri, Nebraska and NPPD misinterpret the discretion the Corps seeks to retain. The Corps does not intend to disregard the Master Manual and thus operate the River with unfettered discretion. To the contrary, the Corps seeks to retain the discretion to deviate from the 2004 Master Manual in the event that unforeseen circumstances arise. The Corps cannot anticipate and provide for all possible circumstances affecting river operations. Although historical patterns provide some insight into future circumstances, the Corps simply cannot predict the future. If the Corps was prohibited from varying its operations from the Master Manual to adjust for unforeseen circumstances, and instead was required to conform to a Master Manual that did not contemplate a given situation, the Corps would arguably violate its obligations under the FCA and Ubbelohde to properly balance river interests.

However, the Court does not construe this discretion to permit the Corps to perpetually evade judicial review. The Eighth Circuit determined that the 1979 Master Manual could serve as a basis for court review. *Ubbelohde*, 330 F.3d at 1029-30. Although the Eighth Circuit made this determination in part by examining the language of the 1979 Master Manual, it also relied on the regulations governing the Corps' promulgation of the Master Manual. Particularly, these regulations "are not the types of procedures one would expect in the promulgation of an internal, non-binding agency guideline." *Id.* at 1029; 33 C.F.R. § 222.5. Therefore, pursuant to *Ubbelohde*, this Court determines that the 2004 Master Manual may likewise serve as a basis for judicial review. The 2004 Master Manual, like the 1979 Master Manual, is binding on the Corps to the extent that the parties may seek judicial review to ensure that the Corps' operations conform to the 2004 Master Manual. The Corps acknowledges that it must abide by the 2004 Master Manual, and that any permanent amendment to the existing provisions of the 2004 Master Manual must go through the procedures contained in 33 C.F.R. § 222.5. (Fed. Defs.' Reply Mem. in Supp. of Mot. on FCA and NEPA at 12.) The Court acknowledges that the Corps must be permitted to vary its operations in the event that changed circumstances require it to do so, but similarly holds that this discretion does not eliminate the propriety of judicial review of the lawfulness of the agency action. Therefore, the 2004 Master Manual satisfies the procedural requirements of *Ubbelohde* and the FCA.

### 3. Recreational Interests

South Dakota maintains that the FCA subordinates navigation to upstream uses of irrigation and domestic water supply. The "O'Mahoney-Millikin Amendment," 33 U.S.C. § 701-1(b) states:



The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in states lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes.

This provision requires that when a conflict between upstream consumptive uses and downstream navigation exists, upstream consumptive uses receive deference. South Dakota does not argue that the 2004 Master Manual does not serve these consumptive uses. Rather, South Dakota argues that the 2004 Master Manual is in "conflict" with South Dakota's consumptive beneficial uses, because the 2004 Master Manual allows for lower levels in reservoirs such that South Dakota may be required to build extensions to irrigation lines or extend intake structures for drinking water at these reservoirs.

South Dakota's argument lacks merit. The statute is not designed to protect against these kind of difficulties, but rather designed to "prohibit destruction of state-created water rights without any compensation at all, by the assertion of an overriding federal easement for navigation." *Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 192 (9th Cir. 1966) (interpreting 33 U.S.C. § 701-1). Moreover, requiring South Dakota to build extensions for irrigation lines or drinking water is not in "conflict" with South Dakota's consumptive beneficial uses, because there is no destruction or denial of South Dakota's water rights. *Kansas v. United States*, 2000 U.S. Dist. LEXIS 21021, File No. 00-4153, 2000 WL 1665260 (D. Kan. Sept. 29, 2000) (finding that mere "potential threat" that Corps' drainage of water from three reservoirs would deny adequate drinking water or interfere

with industrial purposes insufficient to constitute "conflict" with Corps' actions). In fact, the 2004 Master Manual sets forth the minimum levels required to be maintained in the upstream reservoirs, and a "safety cushion" that ensures that these reservoir levels are maintained even under drought conditions. (See 2004 Master Manual, § § VII-10 to VII-11 & Table VII-3.) The 2004 Master Manual complies with the FCA.

#### 4. Conclusion

The Corps' Motion for Summary Judgment on FCA claims is granted. Motions by South Dakota, Nebraska, NPPD, Missouri and Blaske Marine Plaintiffs are denied.

#### B. The Endangered Species Act and Related Claims

The ESA seeks "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such . . . species." 16 U.S.C. § 1531(b). The ESA prohibits any person, including federal agencies, to "take" a listed endangered species. 16 U.S.C. § 1538(a)(1)(B). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19).

In the event that its proposed action may jeopardize a listed species, the Corps must prepare a "biological assessment" evaluating both the species in the action area as well as the potential effects the proposed action may have on the species in the action area. See 50 C.F.R. § 402.02 (defining biological assessment). A proposed action will "jeopardize" the species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id.* If the Corps concludes that its proposed actions may adversely affect the listed species, then it must initiate

consultation with the FWS. This consultation is required to "insure" that the Corps' proposed action "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2).

After this consultation, the FWS must prepare and issue a Biological Opinion ("BiOp") to the Corps. 16 U.S.C. § 1536(b)(3). The BiOp must set forth the FWS's opinion, with supporting information, detailing how the Corps' proposed actions will affect the species. 16 U.S.C. § 1536(b)(3)(A). In the event that the FWS concludes that jeopardy to the species will result, the FWS must also set forth a RPA. *Id.* A RPA is an alternative action "that can be implemented in a manner consistent with the intended purpose of the action," within the Corps' legal authority. 50 C.F.R. § 402.02. A RPA must also be economically and technologically feasible for the Corps to implement. *Id.* The RPA is designed to avoid the likelihood of jeopardizing the continuing existence of the species. *Id.* If the FWS concludes that either the Corps' proposed action or the implementation of a RPA may still result in an incidental take of the species, the FWS must also include an Incidental Take Statement ("ITS") in the BiOp. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i) (setting forth requirements for ITS). An incidental take statement identifies the impact that the take will have on the species, identifies "reasonable and prudent measures" ("RPM") considered necessary to minimize the impact, and sets forth the terms and conditions required to implement the RPMs. *Id.* If the Corps' action is otherwise in compliance with the terms and conditions set forth in the ITS, any action that harms a listed species will not be considered a "take" under the ESA. 16 U.S.C. § 1536(o).

Because the ESA makes no specific provision for judicial review of final agency actions, the scope of the review is governed by the Administrative Procedures Act ("APA"), 5

*U.S.C. § 701 et seq.* The Court reviews an agency action to determine if it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*. If the agency decision fails to articulate a satisfactory explanation for its conclusions, relies on factors which Congress did not intend for it to consider, or fails to consider an important aspect of the problem, that decision is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). Under this standard, the Court's review is narrow, evaluating whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989).<sup>n3</sup> The Court should defer to the agency so long as the agency's interpretation of the evidence was reasonable. *Id.* The Court may not substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).

<sup>n3</sup> American Rivers and other parties argue that Federal Defendants are subject to a heightened standard of review, because the 2003 Amended BiOp is a "reversal" of the 2000 BiOp. The Court disagrees. The law does not require that Federal Defendants provide extensive justification for the Corps' decision. Rather, the decision must be "rational," providing "permissible reasons" for the change. *American Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255-56 (D.D.C. 2003).

## 1. Claims by American Rivers

American Rivers contends that the Corps should maintain river operations pursuant to the 2000 BiOp. As a result of the 2000 ESA consultations, the FWS issued the 2000 BiOp that concluded that the Corps' proposed operations would cause jeopardy to the tern, plover and sturgeon. The RPA in the 2000 BiOp recommended that the Corps utilize both water

flows and habitat construction, among other elements, to avoid jeopardy to the plover, tern and sturgeon. (FWS AR 1237 at 29232.) In November 2003, the Corps and the FWS reinitiated consultation under the ESA. The FWS then issued the 2003 Amended BiOp, which again concluded that the Corps' proposed operations would cause jeopardy to the plover, tern and sturgeon. The 2003 Amended BiOp recommended a multiple species RPA to avoid such jeopardy. The RPA has individual sections allocated to each one of the species. In particular, the 2003 RPA no longer requires both flow modification and habitat construction to avoid jeopardy to the plover and tern. The sturgeon RPA maintains both flow changes and habitat construction, though modified somewhat from the 2000 BiOp RPA.

American Rivers submits numerous arguments challenging the validity of the 2003 Amended BiOp. American Rivers contends that the FWS's elimination of flow changes in the 2003 RPA applicable to the plover and tern is arbitrary and capricious, and that the changes made to the sturgeon RPA are also arbitrary and capricious in violation of the ESA. American Rivers also maintains that the 2003 Amended BiOp violates the ESA because it does not "insure" against jeopardy. As a result, because the Corps fails to follow the 2000 BiOp, American Rivers contends that the Corps' actions "take" the plover, tern and sturgeon in violation of the ESA.

#### a. Plover and Tern RPA

The 2000 BiOp recommended that a spring rise and low summer flow were necessary to avoid jeopardy to all three species. The 2003 Amended BiOp adopts many of the findings and conclusions of the 2000 BiOp, including the general conclusion that flow modifications coupled with habitat construction will prevent jeopardy to the species. (FWS AR 1457 at 33714, 33736.) However, unlike the 2000 RPA, the 2003 RPA eliminates the requirement that both flow modifications and habitat construction are essential to

avoid jeopardy to the plover and the tern. Instead, the 2003 RPA contains additional elements, such as a drought conservation plan, Gavins Point dam summer releases, accelerated construction of shallow water habitat, and adaptive management, that together avoid jeopardy to the plover and tern. (FWS AR 1451 at 33187.)

The 2003 Amended BiOp relies on updated information: (1) completion of a report by the National Academy of Sciences' National Research Council, "The Missouri River: Exploring the Prospects for Recovery;" (2) analysis of the reservoir releases pursuant to the 2000 RPA; (3) continued monitoring and study of listed species; (4) use of a new model to better analyze use of reservoir habitat by the tern and plover; and (5) the critical habitat designation of the plover in October 2002. (FWS AR 1291 at 31065.) Particularly relevant to the plover and the tern is the new information relating to the analysis of the 2000 RPA and the continued monitoring of the species since the 2000 BiOp. (Id.) Since the 2000 BiOp, both the plover and the tern populations have experienced some improvement. (FWS AR 1457 at 33701, 33704.) Further, analysis of the implementation of the 2000 BiOp RPA indicated that intended habitat objectives could not be achieved, and that in fact, spring and summer flows specified in the 2000 BiOp RPA actually impeded the development of sandbar habitat essential to plover and tern survival. (FWS AR 1457 at 33545.)

Elimination and degradation of both plover and tern habitat contribute to the declining status of the species. The 2000 RPA proposed both spring and summer flows and habitat construction to "restore, maintain, and create sandbar habitat for terns and plovers." (FWS AR 1290 at 31040; see FWS AR 1237 at 29230.) However, the Corps sets forth, and the FWS adopts, that the "alluvial geomorphic process" indicated that spring and summer flows would not create sandbar habitat but would potentially destroy beneficial



sandbar habitat. (FWS AR 1290 at 31040; FWS AR 1290 at 31067; FWS 1457 at 33545.) Therefore, the Corps proposed, and the FWS agreed, that the elimination of spring and summer flows coupled with the addition of new RPA elements, would continue to avoid jeopardy to the plover and the tern. American Rivers does not point to any evidence that indicates that the only possible way to avoid jeopardy to the plover and the tern is to implement flow changes and habitat construction. The FWS modified the RPA to prevent further degradation to the plover and tern habitat. Although American Rivers may disagree with the FWS's conclusions, the FWS has articulated a rational basis for its decision to eliminate spring and summer flow changes from the 2003 RPA. n4

n4 Even so, the 2003 RPA does not eliminate flow changes altogether. Although it may not specifically require the implementation of flow changes in order to preserve the plover and the tern, the RPA requires the Corps to develop a water plan that includes a spring rise and low summer flow. In the event the Corps fails to develop such a plan by March 1, 2006, a default water plan that includes both a spring rise and low summer flow must be implemented. (FWS AR 1457 at 33761-62.)

American Rivers also argues that the FWS improperly evaluated the effects on the plover and tern from the Corps' proposed operations. The Court disagrees. Although the FWS utilized a "worst-case-scenario analysis" for both the plover and the tern, the FWS also considered both the historical effects and cumulative and indirect effects of the Corps' proposed operations on the plover and tern. (FWS AR 1287; FWS AR 1540; FWS AR 1457 at 33608-30; 33634-42; 33683-85.) The baseline adopted by the FWS is proper.

#### b. Sturgeon RPA

The sturgeon RPA retains both flow modifications and habitat construction. The 2003 RPA proposes higher summer flows than the summer flows required in the 2000 RPA. The

2000 RPA states that "summer flows shall be decreased . . . to an interim target of 25 Kcfs by June 21, and held at 25 Kcfs until July 15 . . . on July 15, the flows shall be stair-stepped down to a flow of 21 Kcfs until August 15." (FWS AR 1237 at 29230.) The 2003 RPA proposes that for 2004, "summer habitat flow[s] [shall be] no greater than 25 Kcfs beginning no later than July 1, 2004 lasting for a minimum of 30 days at its lowest point." (FWS AR 1457 at 33760.) The 2003 RPA also allows the Corps to develop its own water flow regime, no later than March 1, 2006, but provides a default plan in the event the Corps is unsuccessful. This default plan states that: "beginning on or about June 15, 2006 but no later than July 1, 2006 the Corps shall begin reducing flows to provide a minimum 30 day summer low flow release of no greater than 25 Kcfs." (Id. at 33762.) The Court disagrees with American Rivers' assertion that this change in summer flows is arbitrary and capricious. The 2003 Amended BiOp RPA prevents low summer flows from exceeding 25 Kcfs, and as the Corps points out, the effect at operating at 25 Kcfs instead of 21 Kcfs is minimal. Moreover, these modifications are further complemented by the implementation of other elements in the 2003 RPA.

American Rivers also argues that the 2003 RPA delays implementation of a spring rise, which was required by the 2000 RPA. The Court disagrees. The 2000 RPA permitted a spring rise only in the event that river conditions allowed such a rise. (FWS AR 1237 at 29230.) The 2003 RPA similarly permits a spring rise provided water conditions are favorable. (FWS AR 1457 at 33760-61.) In 2004, because of unfavorable water conditions, there was no spring rise. Whether a spring rise will occur in 2005 depends on the status of water conditions in 2005. The 2003 RPA does not delay spring rise, but rather requires it under favorable conditions, similar to the requirements of the 2000 RPA. Moreover, under the 2003 RPA, the Corps "shall, if hydrologic conditions are suitable, initiate an experimental spring ~~rise~~ to assist and inform the process for establishing

a long-term flow plan." (FWS AR 1457 at 33760-61.) Unlike the 2000 RPA, the 2003 RPA requires an annual spring rise, provided conditions are favorable. American Rivers' argument that the Corps has delayed a spring rise is without merit.

American Rivers also complains that the magnitude of the spring rise in the 2003 RPA is greatly reduced from the 2000 RPA. In the 2000 RPA, the spring rise was included to provide a spawning cue for the sturgeon, and to create and maintain sandbar habitat for the plover and the tern. Although the 2003 RPA does not require a spring rise of the same absolute magnitude as the 2000 RPA, it requires a bimodal spring rise. Water flows do not effectively construct habitat for the plover and the tern, and a bimodal spring pulse may provide greater spawning cues for the sturgeon. (FWS AR 1457 at 33761, 33765; FWS AR 1291 at 31067-72.) Any change in flood plain connectivity as a result of a lower absolute magnitude is also minimal. (Corps AR 1332 at 45605.) Although the spring rise in the 2003 RPA may differ from that in the 2000 BiOp, it is not unlawful.

American Rivers also contends that the accelerated construction of shallow water habitat is improper. Both the 2000 BiOp and the 2003 Amended BiOp recommend that the Corps develop twenty to thirty acres of shallow water habitat per mile of the Missouri River, in an effort to sustain the continued survival of the sturgeon. Although lower flows contribute to the creation of shallow water habitat, such flows do not create enough shallow water habitat to ensure the sturgeon's viability. The 2003 Amended BiOp thus included a measure that requires the Corps to artificially construct shallow water habitat in an effort to meet habitat standards. The Corps is currently operating to construct such artificial habitat, and intends to continue such operations in the future. (FWS AR 1290 at 31057.) This accelerated construction, in conjunction with other RPA elements, is an appropriate measure.

### c. "No Jeopardy" Finding

American Rivers submits that the 2003 Amended BiOp is arbitrary and capricious because it does not insure against jeopardy. American Rivers argues that it is not "reasonably certain" that (1) required flow changes will occur; (2) congressional funding will be sufficient to implement artificial habitat construction; and (3) artificial habitat construction will be effective. The FWS's no jeopardy finding need only rely on a plan that is reasonably certain to be implemented. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1213 (D. Ore. 2003).

American River argues that the 2003 Amended BiOp proposes flow changes that are not "reasonably certain" to occur. The 2003 Amended BiOp requires the Corps to develop, over the next two years, an appropriate flow regime that implements spring and summer flows to protect the sturgeon. In the event the Corps fails to develop this plan, the RPA sets forth a default flow plan that implements both spring rise and lower summer flows. Because the 2003 Amended BiOp requires that such changes be implemented at the latest by March 1, 2006, the Court finds that there is a reasonable certainty that such flow changes will take effect.

American Rivers also argues that the artificial construction of sandbar habitat for the plover and the tern is an unproven mitigation measure, and thus reliance on such construction was arbitrary and capricious. The record reflects that the FWS knew, considered and evaluated both the negative and positive effects of artificial sandbar habitat construction. There is no evidence to suggest that the Corps will fail to implement the measures the FWS recommends. The Corps is further required, in addition to constructing habitat, to continuously monitor and evaluate effects on the plover and the tern, and modify operations as required. Though American Rivers disputes the ultimate success of artificial sandbar habitat creation on plover and tern populations, concerns of uncertainty are inevitable in any

action an agency may take. Such concerns are insufficient to invalidate the 2003 Amended BiOp. Reasonable certainty only applies to the possibility of implementation, not to the overall success of the particular measure. The record supports that the FWS considered both the positive and negative effects of such measures, and thus rationally concluded, in conjunction with the other RPA elements, that this measure would avoid jeopardy to the species. Nothing more is required by the FWS.

American Rivers also argues that the Corps lacks appropriate funding to complete this habitat construction. By its nature, a RPA must be capable of implementation, both economically and technologically. 50 C.F.R. § 402.02. American Rivers points to no evidence to suggest that the Corps will be economically prevented from implementing this RPA. The speculative nature of congressional appropriations is insufficient to render the RPA arbitrary and capricious.

The Court finds that the FWS's 2003 Amended BiOp and its RPA are not arbitrary and capricious. The FWS has provided a rational connection between the facts and the choice made. *Motor Vehicle*, 463 U.S. at 43. Therefore, the 2003 Amended BiOp and its RPA do not violate Section 7 of the ESA.

#### d. The Corps' Actions Result in a Take

American Rivers also argues that the Corps' adoption of the 2003 RPA jeopardizes the species and results in a "take" of the species, in violation of the ESA. After consulting with the FWS, the Corps has an independent duty to insure that its actions satisfy the ESA. 16 U.S.C. § 1536(a)(2). Essentially, the Corps' decision to rely on the 2003 Amended BiOp must not be arbitrary and capricious. Because the Court finds that the 2003 Amended BiOp is valid, the Corps' reliance on the 2003 Amended BiOp is likewise valid.

*Section 9 of the ESA* prohibits a "take" of the endangered or threatened species. 16 U.S.C. § 1538. American Rivers argues that the 2003 Amended BiOp and RPA take the plover, tern and the sturgeon. However, the ESA permits that any taking, in compliance with the Incidental Take Statement ("ITS"), "shall not be considered to be a prohibited taking" of the species. 16 U.S.C. § 1536(o)(2). The 2003 Amended BiOp includes an ITS for the plover, tern, and sturgeon. (FWS AR 1457 at 33769-90.) The Corps has an absolute defense to a *Section 9* claim so long as its operations are in accordance with the 2003 BiOp and the terms and conditions of the ITS. American Rivers fails to demonstrate that the Corps' operations are contrary to the 2003 Amended BiOp and its ITS, and therefore there is no violation of the ESA.

## 2. Claims by Nebraska and NPPD

Nebraska and NPPD ("Nebraska Parties") claim that the FWS and Corps improperly consulted under the ESA, resulting in an improper 2003 Amended BiOp and RPA. They contend that the environmental baseline used in the 2003 Amended BiOp is improper because it fails to include non-discretionary operations such as minimum flow levels. They further assert that the 2003 RPA is invalid because its proposed restoration of a natural hydrograph runs contrary to the Corps' obligations under the FCA. Because the Court concludes that the Corps does not have a non-discretionary duty to maintain minimum water flows, and that the Corps' operations are subject to the ESA, these arguments fail.

The Nebraska Parties further argue that the 2003 RPA is not economically feasible, because it improperly compromises both water supply and hydropower benefits to the Nebraska Parties. However, the requirement that a RPA be "economically and technologically feasible" only requires that the Corps have the resources and technology necessary to implement the RPA. See *Kandra v. United States*, 145 F. Supp. 2d 1192, 1207 (D. Or. 2001). This argument is likewise without merit.



The Nebraska Parties also argue that the 2003 Amended BiOp and RPA are arbitrary and capricious because they are not based on the best scientific data available. The 2003 Amended BiOp proposes to restore some of the river's natural hydrograph to water flows. According to the Nebraska Parties, this proposal bears no resemblance to the river's natural hydrograph, as set forth in the U.S. Geological Survey ("USGS"). (FWS AR 915 at 14687-885.) The 2003 Amended BiOp does not strictly require the natural hydrograph contained in the USGS, but rather suggests that some "semblance" of the natural hydrograph be restored. (FWS AR 1457 at 33551.) The FWS need only recommend a RPA that prevents jeopardy, and there is no evidence that an immediate and complete restoration of pre-dam flows is the only way to prevent such jeopardy. The fact that the FWS chose not to propose a plan contained in one report is insufficient to render the FWS's decision arbitrary and capricious. The Nebraska Parties' Motions fail.

### 3. Claims by Blaske Marine Plaintiffs and Missouri

Blaske Marine and MO-ARK (collectively, "Blaske Marine Plaintiffs") and Missouri submit that the Corps should operate the Missouri River as required by the 1979 Master Manual. Both Blaske Marine Plaintiffs and Missouri argue that the Corps violates the ESA because the low summer flows set out in the 2003 Amended BiOp eliminate some areas of shallow water habitat for the sturgeon in the lower Missouri River. They thus argue that this removal of habitat constitutes a "take" under the ESA. As noted above, however, because the Corps is operating the River pursuant to the 2003 Amended BiOp and the ITS, it has an absolute defense to any *Section 9* claim. *16 U.S.C. § 1536(o)*. Blaske Marine Plaintiffs and Missouri argue that the ITS does not apply to the elimination of habitat on the lower Missouri River, because the ITS does not specifically reference and connect reduced spawning to reduced downstream water flows, and therefore the Corps cannot use the ITS as a

defense to a claim based on this situation. The ITS anticipates a loss in spawning and nursery habitat "because of significantly reduced sediment transport and deposition." (FWS AR 1457 at 33784.) The complete language of the ITS, however, establishes that the decrease in downstream water flow affects the transport and deposition of sediment in the lower Missouri River, thereby affecting the habitat of the sturgeon in this point of the River. *Id.* Thus, the ITS addresses the effect on the sturgeon in the lower Missouri River, and provides an absolute defense to this ESA claim.

Even without this defense, however, there is no violation of the ESA. Blaske Marine Plaintiffs and Missouri fail to demonstrate that low summer water flows result in a "take" of the sturgeon. They argue that the low summer flows significantly modify or degrade the habitat, which actually kills or injures the sturgeon. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995). Though the parties concede that lower flows decrease shallow water habitat in this particular area of the river, Blaske Marine Plaintiffs and Missouri fail to set forth any evidence that this habitat modification actually causes any injury to the sturgeon. Blaske Marine Plaintiffs and Missouri fail to acknowledge that the FWS considered this argument in the 2003 Amended BiOp, and concluded that although lower summer flows may result in a reduction of shallow water habitat in the lower Missouri River, there is no evidence that such action will actually kill or injure the sturgeon. (FWS AR 1457 at 33784.) Blaske Marine Plaintiffs and Missouri fail to consider the effects on the sturgeon of increasing water flows on other areas of the river. Moreover, the slight reduction in habitat in the lower river does not negate the fact that the 2003 Amended BiOp results in an overall net gain in the amount of shallow water habitat on the Missouri River. In fact, lower flows in the 2003 RPA reduce habitat in the lower Missouri River by approximately 200 acres compared to the 1979 Master Manual RPA, while the overall increase of

shallow water habitat on the entire Missouri River under the 2003 RPA compared to the 1979 Master Manual RPA is approximately 1,189 acres. (FWS AR 1291 at 31077, 31079.) Absent some evidence that injury will result to the sturgeon, Blaske Marine Plaintiffs and Missouri's Motions on this point are denied.

Similar to the argument advanced by the Nebraska Parties, Missouri also argues that the 2003 Amended BiOp and RPA are invalid because the FWS and the Corps improperly consulted under the ESA. Missouri also submits that the RPA is invalid because it requires the Corps to violate the FCA by not maintaining minimum flows. As the Court has previously indicated, the FCA does not impose a non-discretionary duty to maintain minimum navigation flows, so these arguments fail.

Missouri further claims that the mandatory language in the 2003 RPA is an attempt by the FWS to supercede the Corps' authority and to "govern the way that the Corps manages the River system." The Court is unpersuaded by this argument. Missouri fails to cite to any legal authority that indicates that the existence of mandatory language in a RPA invalidates it as a matter of law. Moreover, absent any evidence that either the FWS intends to bind the Corps to its RPA or that the Corps considers itself bound by the FWS's RPA, this argument fails.

#### 4. Conclusion

The Court finds that the 2003 Amended BiOp and RPA are not arbitrary and capricious and thus are in accord with the ESA. Likewise, the 2004 Master Manual, 2004 AOP, and ROD do not violate the ESA.

### C. National Environmental Policy Act Claims

NEPA requires that federal agencies prepare an Environmental Impact Statement ("EIS") for every "major Federal action[]" significantly affecting the quality of the

human environment." 42 U.S.C. § 4332(2)(C); see 42 U.S.C. § § 4321-4370f. An EIS must examine: (1) the environmental impacts of the proposed action; (2) the adverse environmental effects of the action that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local, short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitment of resources that would be involved. 42 U.S.C. § 4332(2)(C). Once the EIS is completed, the agency must prepare a ROD. The Court reviews under NEPA "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983). NEPA ensures that the Corps' actions are procedurally valid.

The Corps originally considered the impacts of seven alternatives submitted by different parties. (Final EIS at 4-3 to 4-11; 5-1 to 5-168.) Then, the Corps conducted a detailed analysis of five different alternatives to the 1979 Master Manual: (1) the Modified Conservation Plan ("MCP"), which includes increased drought conservation measures, unbalanced storage among the three upper and largest lakes in the Mainstem Reservoir System, and a Fort Peck spring rise approximately every third year; (2) GP1528, n5 which includes a 15 Kcfs spring rise release from mid-May to mid-June followed by a minimum service flat release of 28 Kcfs that ends on September 1; (3) GP2021, which has a 20 Kcfs spring rise followed by a 25 Kcfs release to mid-July when the release drops to a low of 21 Kcfs until mid-August, when it returns to 25 Kcfs until September 1; (4) GP1521, which has a 15 Kcfs spring rise release from mid-May to mid-June followed by a release of 21 Kcfs; and (5) GP2028, which has a 20 Kcfs spring rise followed by a 28 Kcfs release to mid-May to mid-June followed by a release of 28 Kcfs. (Final EIS at 6-3.) Out of these five alternatives, the Corps eventually

identified a Preferred Alternative ("PA") that included "more stringent drought conservation measures, a more defined methodology for unbalancing the upper three lakes, higher non-navigation season flows, and a planned re-evaluation in 3 years." (Id. at 8-1.) The 2004 Master Manual and 2004 AOP thus evolve from this PA.

n5 "GP" means "Gavins Point" and the two numbers that follow correspond to the spring release and summer release, respectively.

### 1. Missouri

Missouri argues that Federal Defendants violated NEPA because the adoption of "adaptive management" process is improper, and the economic analysis used by the Corps in choosing the PA is flawed and misleading. Missouri fails to demonstrate that the Federal Defendants' decisions were arbitrary and capricious.

The Final EIS and the 2004 Master Manual describe the "adaptive management" process. Adaptive management is an approach to natural resources management, in which policy choices are made incrementally. As each choice is made, data on the effects of these choices are collected and analyzed in order to assess whether to retain, reverse, or otherwise alter the policy choice. Missouri maintains that this adaptive management approach violates NEPA because it permits the Corps to circumvent the NEPA process when policy choices are modified. Missouri takes issue with the potential flow changes that the Corps may undertake in the future. Missouri fails to point to any evidence that indicates that the Corps intends to avoid its NEPA obligations by implementing this adaptive management approach. To the contrary, the Corps acknowledges that in the event a major policy change results, the Corps will be required to comply with NEPA. (Final EIS at D1-69; Corps AR 1970 at 3.) Absent evidence that the adaptive management process actually results in the Corps'

evasion of NEPA obligations, the Court declines to declare this approach invalid.

Missouri also argues that the Final EIS is flawed because it incorrectly calculated the value of benefits to navigation and downstream water supply resulting from the adoption of the RPA. Missouri essentially contends that it is impossible for any increased economic benefit to result to navigation and downstream water supply as a result of lower downstream water flows. Missouri disagrees with the Corps' conclusions, but fails to demonstrate why the Corps' analysis is arbitrary and capricious. The Corps comparatively evaluated the economic effects of the PA to the 1979 Master Manual on a variety of different river interests, including navigation and water supply. (See Final EIS 8-10 to 8-49.) The Final EIS was based on the previous draft EIS and its comments, as well as other economic studies. Missouri may disagree with the Corps' conclusions and its rationale, but that is insufficient to argue that the Corps failed to take a "hard look" at the economic impact of its decision. *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) The Corps articulates a rational basis for its conclusions. Missouri's disagreement with the Corps' conclusions is insufficient to render the Final EIS arbitrary and capricious.

## 2. Blaske Marine and MO-ARK

The 2004 AOP requires that the Corps restrict summer flows from Gavins Point to 25 Kcfs for a period of 30 days beginning July 1, 2004. If the Corps develops 1200 acres of shallow water habitat by July 1, n6 the Corps may engage in another consultation with the FWS to determine how much higher it can adjust summer flows. n7 Blaske Marine and MO-ARK (collectively, "Blaske Marine Plaintiffs") assert that the Corps must prepare a supplemental EIS discussing the impacts of operating under such conditions. n8 Blaske Marine Plaintiffs also argue that the default water flow plan



set for March 2006 contained in the 2003 RPA requires a supplemental EIS.

n6 Federal Defendants represented to the Court at oral argument on May 21, 2004, that the Corps fully intended to successfully complete this habitat construction by July 1, and that the current status of the construction was on track for such completion. On June 14, 2004, Federal Defendants informed the Court that construction was complete and that consultation between the FWS and Corps had begun. The FWS anticipates that it will issue an opinion relating to 2004 summer flows on June 22, 2004.

n7 Any claims relating to the outcome of this consultation between the FWS and Corps are not ripe for review.

n8 Blaske Marine Plaintiffs failed to include this claim in their Complaint. Consistent with the Court's oral ruling on May 21, 2004, the Court permits Blaske Marine Plaintiffs to amend their Complaint to include this claim.

The 2003 Amended BiOp proposes a flow of 25 Kcfs for 30 days beginning July 1, 2004. The 2004 AOP implements this alternative. The Final EIS issued on March 5, 2004, evaluated the effects of summer flows at 21 Kcfs and at 28.5 Kcfs. (Final EIS Table 7-1.) The Final EIS does not specifically evaluate the effects of flows at 25 Kcfs. However, flows at 25 Kcfs are within the range of alternatives evaluated by the Corps. The purpose of the Final EIS is to ensure that the Corps takes a "hard look" at the environmental consequences of a project before taking a major action. *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1128. An EIS must discuss alternatives to the proposed action, and the sufficiency of the range of alternatives evaluated is subject to the "rule of reason." *Id.* The "rule of reason" requires the Court to determine whether the Corps has complied with the Final EIS in good faith, and whether the Final EIS "sets forth sufficient information to allow the decision-maker to consider alternatives and make a

reasoned decision after balancing the risks of harm to the environment against the benefits of the proposed action." *Id.* The Final EIS need not be exhaustive. *Id.* The Court finds that although the Final EIS did not specifically evaluate summer flows at 25 Kcfs, the range of alternatives discussed in the Final EIS encompassed such flows. Thus, the Final EIS sufficiently examined summer flows at 25 Kcfs.

In conjunction with these flow levels, the Corps anticipates that it will complete construction of 1200 acres of shallow water habitat by July 1, 2004. Blaske Marine Plaintiffs contend that construction of this habitat requires a supplemental EIS. In both the 2000 BiOp and the 2003 Amended BiOp, the FWS set a goal to develop twenty to thirty acres of shallow water habitat per mile of the Missouri River. From years 2000 to 2020, 20,000 acres of shallow water habitat must be developed. Low summer flows help to develop shallow water habitat, but not at the level required to protect the sturgeon. The FWS concluded that a multi-faceted approach was necessary to achieve its goals: reservoir operational changes, structural modifications, and non-structural modifications. The FWS determined that 4900 acres of shallow water habitat results from flows at 21 Kcfs for a period from mid-July to mid-August, while 3,717 acres of shallow water habitat results from full navigation flows of 34.5 Kcfs from mid-July to mid-August. The difference between shallow water habitat construction at low flows and at full navigation flows is thus 1200 acres. If the Corps artificially constructs 1200 acres of shallow water habitat by July 1, depending on its consultations with the FWS, it may operate at possibly full navigation flows because the 1200 acres of artificial habitat construction will compensate for the smaller levels of shallow water habitat construction at full navigation flows. Both the 2000 BiOp and the 2003 Amended BiOp contemplate that artificial habitat construction is necessary to maintain sufficient shallow water habitat. The Final EIS also acknowledges that artificial shallow habitat construction is needed to provide enough

shallow water habitat. (Final EIS 7-71.) Moreover, Blaske Marine Plaintiffs fail to demonstrate that this shallow water habitat construction is a "major Federal action[] significantly affecting the quality of the human environment," or that a categorical exclusion does not apply. 42 U.S.C. § 4332; 62 Fed. Reg. 2375, 2381 (Jan. 16, 1997). n9 This failure is fatal to the claim that the FWS must issue a supplemental EIS.

n9 The Court further notes, based on representations by the Federal Defendants that 1200 acres have been created, that Blaske Marine Plaintiffs' claim on this point is likely moot. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 159 L. Ed. 2d 137, 124 S. Ct. 2373, 542 U.S. . . . 2004 WL 1301302 (June 14, 2004) (supplemental EIS not required if "major" federal action already completed); (*Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988) (dismissing plaintiffs' NEPA claim because ordering compliance with NEPA would have no effect on the already-completed agency action).

Blaske Marine Plaintiffs also argue that the proposed default water plan that may potentially take effect in March 2006, requires a supplemental EIS. The proposed default water plan was not evaluated nor considered under the Final EIS. This default plan takes effect in 2006 only if the Corps fails to develop "a flow management plan . . . [that] provide[s] a spring rise and summer flow which will provide for the life history needs of the pallid sturgeon." (FWS AR 1457 at 33761.) Because neither the default plan nor any future plan were evaluated under any of the alternatives contained in the Final EIS, further NEPA analysis may be required. n10 40 C.F.R. § 1502.9(c)(1) (supplemental EIS required when the "agency makes substantial changes in the proposed action that are relevant to environmental concerns," or when there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"). However, this issue is not yet ripe for the Court's review.

n10 The Court does not intend to make any finding regarding the Corps' obligations under NEPA for this potential future action.

### 3. South Dakota

South Dakota argues that the Corps violated NEPA because it failed to consider the modified "Governors' Summit Proposal" (a.k.a. "Nebraska Proposal") in its analysis of drought conservation measures. South Dakota also contends that the Corps improperly considered the interests of the Mississippi River stakeholders in determining the preferred alternative for drought conservation. Finally, South Dakota contends that the Corps failed to consider shortening the navigation season in the spring rather than in the fall.

The Governors within the Missouri River basin held a summit meeting in September 2003 to discuss the conflict over river operations. A summit plan was created by those in attendance. Although this report was not specifically included in the Final EIS, the range of proposals considered by the Corps in the Final EIS encompassed the proposals in the Governor's Summit Proposal. For example, the Governor's Summit Proposal envisioned that operations would include low summer flows at 25 Kcfs. As previously discussed, the Final EIS contained an analysis of low summer flows of 21 Kcfs to 28 Kcfs, thus encompassing flows proposed in the Governor's Summit Proposal. The Corps is under no obligation to consider each and every alternative, but rather it must evaluate a considerable range of alternatives to allow it to "make a reasoned decision." *Friends of Boundary Waters Wilderness*, 164 F.3d at 1128. South Dakota fails to demonstrate that the Corps' alleged failure to specifically consider this report was arbitrary and capricious.

The Corps' consideration of the impact of the PA on the Mississippi River was not arbitrary or capricious. NEPA requires that the agency evaluate all foreseeable impacts of a

major federal action. The operation of the Missouri River impacts the operation of the Mississippi River. Moreover, South Dakota submits no legal authority to support its claim that the Corps evaluated too many considerations.

Finally, South Dakota's submits that the Corps acted arbitrarily and capriciously because it failed to adopt an alternative that shortened the navigation season in the spring, rather than the fall. According to South Dakota, shortening the navigation period in the spring preserves more water in the upstream reservoirs during the essential fish spawning period. However, the Corps points out that the greatest infusion of water occurs in the spring. If the Corps shortened the water season in the spring, it would do so without considering the water infusions from winter precipitation and spring flows. Failure to consider the spring infusion of water flow may result in an unnecessary shortening of the navigation season. The decision to shorten the fall navigation season is made by July 1 of each navigation year, which allows affected parties to adjust their operations and interests accordingly. If the Corps shortens the spring navigation season in March, the decision to shorten the spring season would have to be made in December, when it is impossible to judge future water conditions. South Dakota fails to establish that the Corps' alleged failure to consider this alternative is arbitrary or capricious. South Dakota's claims fail.

#### 4. American Rivers

American Rivers asserts that the Corps violated NEPA because it selected a PA without "adequate explanation." (Am. Rivers Mem. in Opp'n to FCA/NEPA claims at 4.) American Rivers contends that the Corps failed to explain why the PA it selected was superior to the other evaluated alternatives, in particular GP2021, and thus that the Corps' decision is arbitrary and capricious.

NEPA only requires that the Final EIS demonstrate that the agency in good faith objectively has taken a "hard look"

at the environmental consequences of a proposed action and alternatives. *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1128. The Final EIS must provide sufficient detail to permit those who did not participate in its preparation to understand and consider the relevant environmental influences involved. Finally, an agency's consideration of alternatives need only be reasonable. *Id.* n11

n11 Under NEPA, the agency:

should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public . . . . Agencies shall: (a) rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; (b) devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; (c) include reasonable alternatives not within the jurisdiction of the lead agency; (d) include the alternative of no action; (e) identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference; and (f) include appropriate mitigation measures not already included in the proposed action or alternatives. 40 C.F.R. § 1502.14.

The Corps evaluated the five alternatives under four objectives, to select the PA that:



(1) served the contemporary needs of the Missouri River Basin and the Nation; (2) complied with environmental laws, including the [ESA]; (3) served Congressionally authorized project purposes; and (4) fulfilled the Corps' responsibilities to Federally recognized Tribes.

(Final EIS at 8-1.) The Corps ultimately selected a PA that best met these objectives:

The rationale for selecting the PA is a composite of analyses, information briefings, technical expertise, and comments concerning the resources evaluated as part of the Study. The Corps believes that the PA, when combined with other measures . . . conserves more water in the upper three lakes during extended droughts, meets the needs of ESA-listed fish and wildlife species, is consistent with the Corps' responsibilities under environmental laws and Tribal trust responsibilities, and provides for the Congressionally authorized uses of the system.

(Id. at 8-4.) In selecting this PA, the Corps conducted a detailed analysis of all five alternatives and the 1979 Master Manual, in the areas of (1) hydrology; (2) water quality; (3) sedimentation, erosion and ice processes; (4) economic effects; and (5) environmental effects. (Id. at 7-1 to 7-256.) The Final EIS presents an analysis pertaining to each criteria in comparative form. (Id.) The Final EIS then describes the PA, the effects of the PA, and directly compares the PA to the MCP alternative and the 1979 Master Manual. Although the PA is not directly compared to GP2021, American Rivers fails to cite any legal authority to support the assertion that such a comparison is required. Moreover, American Rivers fails to demonstrate why the detailed analyses and comparisons included in Chapter Seven of the Final EIS are

insufficient under NEPA. The Court thus finds that the Corps' decision to implement the PA was made in good faith after proper consideration of the alternatives, and is therefore reasonable and complies with NEPA.

### 5. Conclusion

Federal Defendants' Motion for Summary Judgment on NEPA claims is granted. The Motions by Missouri, Blaske Marine Plaintiffs, South Dakota, and American Rivers are denied.

## D. Collateral Claims

### 1. Mandan, Hidasta, and Arikara Nation

The Nation claims that Federal Defendants must operate the River in a manner that: (1) best protects Tribal trust assets and advances economic self sufficiency of the Nation and its members; (2) avoids adverse impacts to federally protected cultural resources and burial sites; and (3) assures the low-income residents of the Fort Berthold Indian Reservation that their recreation and fishing economies will not disproportionately suffer. The Nation also requests that the Court direct Federal Defendants to identify and transfer excess project lands at Lake Sakakawea to the Nation and neighboring entities. n12 Federal Defendants claim that the Nation lacks Article III standing.

n12 The Nation originally pursued a claim under North Dakota's Clean Water Act. As a result of this Court's order in *North Dakota v. U.S. Army Corps of Eng'rs*, 320 F. Supp. 2d 873, 2004 U.S. Dist. LEXIS 10109, Civil File No. 03-4288, 03-MD-1555 (Apr. 12, 2004) (PAM), the Nation and the Corps stipulated to dismissal of Count III of the Nation's Complaint.

The jurisdiction of the federal courts is limited to cases or controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Among

other constitutional minimums, a "case or controversy" requires the plaintiff to have standing to litigate the action. Standing burdens the plaintiff to demonstrate: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that a favorable court decision can redress the injury. *Id.*

The Nation seeks an order directing the Corps to consider certain tribal interests and to operate the River in a particular way. However, the Nation fails to articulate any injury in fact. The Nation has failed to establish either a concrete and particularized injury, or actual or imminent injury. See *id.* Although the Nation clearly identifies its concerns and its particular interest in River operations, it fails to indicate how the 2004 Master Manual and 2004 AOP or any other action of the Federal Defendants have resulted or will result in injury. "An asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). Because the Nation has failed to articulate any injury in fact, the Nation lacks standing and its Amended Complaint must be dismissed.

## 2. Blaske Marine Plaintiffs

Blaske Marine Plaintiffs have asserted collateral claims that challenge: (1) the stocking of non-native and native fish in the Missouri River; (2) the final rule published by the FWS designating a critical habitat for the piping plover; and (3) Federal Defendants' compliance with the *Information Quality Act* ("IQA").

### a. Fish Stocking Claims

Blaske Marine Plaintiffs assert that the stocking of fish by Montana, North Dakota, South Dakota ("the States") and the FWS, "may or will have" adverse effects on the pallid sturgeon and the environment, in violation of the ESA. (Blaske Marine Pls.' Mem. in Supp. of Mot. on Eighth Claim

for Relief at 2.) Blaske Marine Plaintiffs contend that the States and the FWS violated NEPA by failing to prepare an EIS on the fish stocking program because of these possible effects. n13

n13 Blaske Marine Plaintiffs also allege that the States and the FWS's fish stocking violates *Section 9 of the ESA*, because it "takes" the sturgeon. Both FWS and the States have filed substantive Motions against Blaske Marine Plaintiffs on this issue, to which Blaske Marine Plaintiffs failed to respond. Because Blaske Marine Plaintiffs fail to demonstrate that the stocking of fish in mainstem reservoirs constitutes a "take" of the sturgeon, both FWS's and the States' Motions must be granted on this point.

The States have programs that stock fish in the Missouri River and its mainstem reservoirs. The States receive federal funding for these programs. (FWS Fish Stocking ("FS") AR 38 at 936.) The FWS also provides stocking fish from its own hatcheries to the States. Fish stocked include native and non-native species. The non-native species include chinook salmon, rainbow trout, rainbow smelt and walleye. (FWS FS AR 102.) Blaske Marine Plaintiffs contend that the FWS failed to comply with NEPA because it did not prepare an EIS on fish stocking. FWS argues that an EIS was unnecessary, because a categorical exclusion applied. n14

n14 Although the Court concludes that the FWS was not legally required to prepare an EIS with respect to fish stocking, the Court notes that Blaske Marine Plaintiffs' standing to raise this claim is questionable. NEPA challenges under the APA require Blaske Marine Plaintiffs to demonstrate that their alleged injuries fall within the zone of interests that NEPA is designed to protect. NEPA's broad purpose is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Blaske Marine Plaintiffs are downstream interests with concerns focused on the level of downstream water flows. Most, if not all, of the organizations represented by Blaske

Marine Plaintiffs, allege economic injury from lower downstream flows. Federal Defendants and the States present a persuasive argument that Blaske Marine Plaintiffs' injury from fish stocking activities is solely economic in nature, and therefore not protected by NEPA. However, Blaske Marine Plaintiffs do allege that maintaining higher water levels in upstream reservoirs to support fish stocking activities causes harm to the environment by reducing habitat for the plover and the tern. Blaske Marine Plaintiffs thus assert that their interests are not purely economic. Parties motivated in part by the protection of their own economic interests may challenge agency action so long as their environmental interests are not so insignificant that they should be disregarded altogether. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002). Though the Court finds Blaske Marine Plaintiffs' connection to environmental injury attenuated at best, the Court will presume that Blaske Marine Plaintiffs have standing and will consider the merits of this claim.

Under NEPA, an EIS is not necessary when the action in question falls within a categorical exclusion established through the agency's own NEPA implementation procedures. 40 C.F.R. § 1501.4(a)(2). A categorical exclusion does not "individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4. Under its NEPA implementation procedures, the FWS concluded that a categorical exclusion applied, rendering an EIS relating to fish stocking unnecessary. See 62 Fed. Reg. 2375, 2381 (Jan. 16, 1997) (defining categorical exclusions). The Court reviews an agency determination that an action falls within a categorical exclusion under the arbitrary and capricious standard. *Friends of Richards-Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1187 (8th Cir. 2000). Blaske Marine Plaintiffs contend that the FWS's determination that a categorical exclusion applied was arbitrary and capricious



because of the past and potential harm such stocking has on the pallid sturgeon and the environment.

Blaske Marine Plaintiffs rely heavily on a report prepared by Dr. Harold Tyus. n15 (See FWS FS AR 92.) In that report, Dr. Tyus comments on the possibility that non-native fish adversely affect the sturgeon. This report is broad and generalized, fails to indicate which non-native fish adversely affect the sturgeon, and does not connect the fish stocking activities of the States or the FWS to the alleged harm. Blaske Marine Plaintiffs' reliance on Dr. Tyus's report is unpersuasive.

n15 The States have filed a Daubert Motion to exclude this extra-record submission, as well as the other exhibits accompanying Blaske Marine Plaintiffs' Motion. The Federal Defendants have also filed a Motion to Strike this evidence, to the extent that it is not part of the administrative record. Blaske Marine Plaintiffs submit that because the relief they seek is prospective in nature, the Court is entitled to look at extra-record evidence. The Court finds that argument unpersuasive. Even so, the Court declines to address the Motion to Strike or the Daubert Motion, as Dr. Tyus's report is properly part of the administrative record.

The record establishes that the FWS's decision to apply a categorical exclusion is not arbitrary nor capricious. The sturgeon was originally listed as threatened because of "habitat modification, apparent lack of natural reproduction, commercial harvest, and hybridization in part of its range," not for reasons related to fish stocking. (FWS FS AR 5.) Moreover, the record supports that the FWS considered many possible effects of fish stocking on the sturgeon, including predation and competition, and concluded that fish stocking activities would not adversely affect the sturgeon. (FWS FS AR 19 at 410-412; id. 38 at 936-937; id. 62 at 1833-1834.) The record simply does not support Blaske Marine Plaintiffs' assertion that a "significant" effect will result either on the



environment or the pallid sturgeon as a result of fish stocking activities. The FWS's application of a categorical exclusion is therefore not arbitrary and capricious. Blaske Marine's Motion for Summary Judgment thus fails. n16

n16 Because this claim against the FWS fails, it likewise fails against Montana, North Dakota and South Dakota. Even so, the States are not proper parties for this NEPA claim. Blaske Marine Plaintiffs argue that NEPA was violated because an EIS was not issued on fish stocking. However, the FWS, not the States, is responsible for EIS determinations, and therefore Montana, North Dakota and South Dakota are inappropriate defendants for this claim.

#### b. Critical Habitat Claims

In 2002, the FWS designated the critical habitat for the piping plover. Blaske Marine Plaintiffs contend that this critical habitat designation violates the ESA, NEPA, the *Small Business Regulatory Enforcement Fairness Act* ("SBREFA"), and the notice and comment procedures of the APA.

The ESA directs the Secretary of the Interior to list a particular species as endangered or threatened. It also directs the Secretary to designate critical habitat "to the maximum extent prudent and determinable" at the time of the species listing. 16 U.S.C. § 1533(a)(3)(A). A critical habitat is the geographical area that the species occupies. The physical or biological features of the critical habitat are essential to the species' conservation and require special management or protection. Id. § 1532(5)(A)(i). The critical habitat designation must be made by relying on the best scientific data available, taking into consideration the economic impact and any other relevant impact of specifying an area a critical habitat. Id. § 1533(b)(2).

#### i. ESA Claims

Blaske Marine Plaintiffs argue that the FWS violated the ESA because it failed to properly consider the economic and other impacts resulting from the designation of the plover's critical habitat, and then failed to properly balance these impacts against the benefits of the habitat designation. Blaske Marine Plaintiffs specifically contend that the FWS should have excluded a small area in its habitat designation below Fort Randall and Gavins Point.

Blaske Marine Plaintiffs do not have standing to raise this claim. Blaske Marine Plaintiffs allege that their economic interests, such as power production and regional transportation, suffer because of the lack of downstream water flow. Blaske Marine Plaintiffs submit that the FWS failed to consider these economic factors and impacts in the plover's critical habitat designation, and thus failed to exclude the area below Fort Randall and Gavins Point from the plover's critical habitat. However, Blaske Marine Plaintiffs fail to indicate how excluding this area from critical habitat redresses their alleged injuries resulting from decreased downstream water flows. Even if this area were excluded from critical habitat, Blaske Marine Plaintiffs provide no evidence that this exclusion would increase downstream water flows or somehow redress their alleged injuries. Irrespective of critical habitat designation, the Corps is still required to maintain water flows to comply with its other legal obligations. Blaske Marine Plaintiffs fail to establish that impairment of their interests are actually attributable to the critical habitat designation. Thus, Blaske Marine Plaintiffs lack standing to challenge the critical habitat designation of the plover under the ESA.

Even if Blaske Marine Plaintiffs had standing, however, the Court finds that the FWS sufficiently considered all economic factors and impacts, and properly balanced these impacts in its designation. In *New Mexico Cattle Growers Assoc. v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001), the Court required that the FWS examine all

economic impacts of the critical habitat designation, irrespective of whether such impacts were co-extensive with other causes. *Id.* at 1283. In this case, in its economic analysis, the FWS expressly acknowledged its duties under New Mexico Cattle Growers. (FWS Critical Habitat ("CH") AR 5-2584 at 13368, 13397.) The analysis considered and evaluated both impacts associated with listing the plover under the ESA and impacts related to the designation of the critical habitat, as well as impacts attributable to other causes. (FWS CH AR 5-2584.) The FWS ultimately concluded that the benefits of excluding the area below Fort Randall and Gavins Point did not outweigh the benefits of designating such an area as critical habitat. (FWS CH AR 5-2584.) The Court finds that the FWS did not act arbitrarily or capriciously in designating critical habitat for the plover. n17

n17 Blaske Marine Plaintiffs alternatively submit that the FWS designated critical habitat although it had insufficient information to make such a determination. However, the FWS points out that the designation in this instance was pursuant to Court order, and that it was based on the best scientific information available at that time. See 67 *Fed. Reg.* 57638, 57642.

## ii. NEPA Claims

Blaske Marine Plaintiffs submit that the critical habitat designation is flawed because the FWS failed to follow NEPA procedures in the designation. n18 Under NEPA and its corresponding regulations, an agency may prepare an Environmental Assessment ("EA") in lieu of an EIS, as long as the agency's proposed action does not clearly require an EIS. 40 *C.F.R.* § 1501.4(a)-(b); *Dep't of Transp. v. Pub. Citizen*, 541 *U.S.* 752, 159 *L. Ed. 2d* 60, 124 *S. Ct.* 2204, 541 *U.S.* , 2004 *WL* 1237361 at 3 (June 7, 2004). If the agency concludes that an EIS is not required, then it must issue a "finding of no significant impact" ("FONSI") that describes why the proposed action will not significantly impact the

human environment. 40 C.F.R. §§ 1501.4(e), 1508.13. In this case, the FWS conducted an Environmental Assessment ("EA") that evaluated four different alternatives, published the EA for public review and comment, and thereafter issued a FONSI for the plover's critical habitat designation.

n18 Whether NEPA procedures must be followed for the designation of critical habitat is an issue of first impression in the Eighth Circuit. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit determined that a NEPA analysis is not required, while in *Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996), the Tenth Circuit held otherwise. Because the Court finds that the FWS complied with NEPA, it declines to evaluate whether the FWS is required to comply with NEPA in a critical habitat designation.

An agency's decision not to prepare an EIS will be set aside only if its decision is arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 838 (8th Cir. 1995). The Court considers four factors to determine whether the FWS's decision not to prepare an EIS is arbitrary and capricious: (1) whether the FWS took a "hard look" at the problem; (2) whether the FWS identified the relevant areas of environmental concern; (3) whether the FWS made a convincing case that the impact was insignificant; (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum. *Earth Protector, Inc. v. Jacobs*, 993 F. Supp. 701, 706 (D. Minn. 1998) (Tunheim, J.) (citing *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992)). The Court must determine if the FWS made a clear error in judgment. *Id.*

Blaske Marine Plaintiffs submit that the FWS should have prepared an EIS because the impacts on the human environment are "significant." The FWS is required to evaluate both the context and intensity to determine whether

the critical habitat designation will have significant impacts. 40 C.F.R. § 1508.27. "Intensity" refers to the severity of the impact, which can be evaluated by considering ten different factors. *Id.* Blaske Marine Plaintiffs contend that the mere existence of any of these factors is sufficient to render the impact "significant." The Court disagrees. As required by the regulations, the EA considered all ten factors, and concluded that any impact would be minimal. (FWS CH AR 1-111 at 1817-18.) Blaske Marine Plaintiffs fail to demonstrate how any of the alleged "plethora" of impacts are significant under NEPA. Blaske Marine Plaintiffs' argument on this point fails.

Blaske Marine Plaintiffs further argue that the FWS failed to consider any effects the critical habitat designation had on the human environment. The Court disagrees. The EA addressed impacts on fish and wildlife, recreation, agriculture (including farming and grazing), water management, and socioeconomics such as property values. (FWS CH AR 1-111 at 1805-16.) The EA also evaluated each of the ten intensity factors, and concluded that those impacts, including any on the human environment, would be minimal. Blaske Marine fails to demonstrate that the FWS's decision to issue an EA and FONSI instead of an EIS was an "error in judgment."

### iii. *Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act Claims*

Blaske Marine Plaintiffs argue that the FWS's critical habitat designation violated the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-12, and the Small Business Regulatory Enforcement Flexibility Act ("SBREFA"), 5 U.S.C. §§ 801-08. Generally, under RFA, a regulatory flexibility analysis must be prepared and made available for public comment on the impacts of the proposed rule. 5 U.S.C. §§ 603, 604. If the agency certifies that the rule will not have a significant impact on a substantial number of small entities, this analysis is not required. *Id.* § 605(b). In this case, the FWS certified that the critical habitat



designation would not have a significant impact on a substantial number of small entities. 67 *Fed. Reg.* 57638, 57676 (Sept. 11, 2002). This certification also set forth the rationale for its conclusion. *Id.* Blaske Marine Plaintiffs submit that this finding is arbitrary and capricious because it relies on the FWS's erroneous economic analysis. Because the Court concluded that the baseline in the economic analysis was not flawed, Blaske Marine Plaintiffs' argument on this point fails. (See *supra* Section D(2)(b)(iii).)

Under SBREFA, before a rule can take effect, the FWS is required to submit to Congress a report containing a copy of the rule, a general statement relating to the rule, including whether it is a major rule, and the proposed effective date of the rule. 5 *U.S.C.* § 801(a)(1)(A). A "major rule" is one that will likely result in (1) an annual effect on the economy of \$ 100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal state, or local government agencies, or geographic regions; or (3) any significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the domestic enterprises to compete with foreign enterprises in domestic and export markets. 5 *U.S.C.* § 804(2). The FWS determined that the designation of the plover's critical habitat was not a major rule under § 804(2). 67 *Fed. Reg.* 57638, 57677 (Sept. 11, 2002). Under SBREFA, this determination is not subject to judicial review. 5 *U.S.C.* § 805. Even so, there is no evidence that the FWS's decision was arbitrary and capricious. Blaske Marine Plaintiffs' claims under RFA and SBREFA fail.

#### iv. APA Claims

Blaske Marine Plaintiffs also assert that the final rule issued by the FWS for the critical habitat designation deviated so much from the proposed rule that it violated 5 *U.S.C.* § 553 by failing to provide for additional public review and comment. The FWS submits that the final rule was a "logical outgrowth" of the proposed rule and therefore,



an insufficient deviation to warrant additional review and comment.

The APA requires that an agency allow for public comment and review in its rule making procedures. 5 U.S.C. § 553.

A final rule which contains changes from the proposed rule need not always go through a second notice and comment period. An agency can make even substantial changes from the proposed version, as long as the final changes are in character with the original scheme and a logical outgrowth of the notice and comment. The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. [The Court] must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing. Thus, where the final rules are a result of a complex mix of controversial and uncommented upon data and calculations, remand may be in order.

*Natural Res. Def. Council, Inc. v. E.P.A.*, 824 F.2d 1258, 1283 (1st Cir. 1987) (citations and quotation omitted). Blaske Marine Plaintiffs contend that the final rule acknowledges economic impacts that the proposed rule did not address, and that the final rule is so significant a deviation that it warrants an additional comment and review period. The Court finds Blaske Marine Plaintiffs' argument unpersuasive and unsupported by the record. As the FWS points out, the proposed rule recognized that the critical habitat designation would result in minimal economic impacts. (FWS CH AR 5-2584.) Although the final rule further detailed these economic impacts, the Court does not

find that these extensions are not in "character" with the proposed rule. Blaske Marine Plaintiffs further fail to indicate that any of their potential comments would have offered new or different criticisms that the FWS might have found convincing. Thus, the Court finds that the FWS did not violate the APA by failing to provide an additional comment period for the critical habitat designation.

### c. Information Quality Act Claims

Blaske Marine Plaintiffs also claim that Federal Defendants have violated the Information Quality Act ("IQA"), 44 U.S.C. § 3516. Specifically, they argue that Federal Defendants failed to comply with their request for "information and science" regarding the augmented spring pulse and proposed default flow plan scheduled for March 2006. However, the language of the IQA indicates that the Court may not review an agency's decision to deny a party's information quality complaint.

The IQA does not provide for a private cause of action, and Blaske Marine Plaintiffs seek judicial review under the APA. Federal Defendants dispute that the APA can be invoked, claiming that there is no law for the Court to apply. Generally, the APA permits the Court to review an agency action. 5 U.S.C. § 702. However, if an agency action is committed to agency discretion by law, the Court is not entitled to conduct any review. 5 U.S.C. § 701(a)(2). If a statute is "drawn in such broad terms" that "there is no law to apply," then the agency action is committed to agency discretion. *Heckler v. Chaney*, 470 U.S. 821, 830, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). Although the IQA directs the Office of Management and Budget ("OMB") to issue guidelines that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency, the plain language of the legislation fails to define these terms. 44 U.S.C. § 3516. Moreover, the history of the legislation fails to provide any indication as to the

scope of these terms. Absent any "meaningful standard" against which to evaluate the agency's discretion, the Court finds that Congress did not intend the IQA to provide a private cause of action, and therefore Blaske Marine Plaintiffs' IQA claim fails.

## CONCLUSION

"Man cannot exercise control over the weather." S. Doc. No. 78-191, at 17 (1944). In an attempt to control the effects of the weather, Congress enabled government agencies to regulate the operation of the Missouri River. In a perfect world, such regulation would adequately provide for all competing river interests regardless of the weather, while simultaneously protecting and preserving the environment and the species it harbors. The Corps and its corresponding government agencies have the insurmountable task to achieve this illusory perfection.

The Court commends the parties for vigorously advocating their positions. However, it is for this reason that Congress delegated Missouri River operations to the Corps. The Missouri River cannot be operated in a vacuum, but rather the Corps must consider, evaluate, and balance all interests in its operation of the Missouri River. This obligation is further compounded by the uncertainty of the weather and its unpredictable effect on river conditions. It is inevitable that the Corps' decisions will not be perfect, as evidenced by this extensive litigation. But, the "standard for agency action is not one of perfection." *Central South Dakota Co-op. Grazing Dist. v. Dep't of Agric.*, 266 F.3d 889, 901 (8th Cir. 2001).

Moreover, a guiding principle behind the APA is to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 542 U.S. , 2004

WL 1301302, at \*7 (June 14, 2004). While the Court acknowledges the competing interests of the parties, the Court finds that the Federal Defendants have not acted arbitrarily and capriciously throughout their development of the 2004 Master Manual and 2004 AOP. Therefore, the 2004 Master Manual and 2004 AOP are valid, and the Corps must operate the Missouri River accordingly.

Accordingly, based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

A. Federal Defendants' Motion for Summary Judgment on FCA and NEPA Claims (Clerk Doc. No. 245) is **GRANTED**;

B. Federal Defendants Motion for Summary Judgment on ESA Claims (Clerk Doc No. 242) is **GRANTED**;

C. Federal Defendants' Motion for Summary Judgment on Blaske Marine Plaintiffs' Collateral Claims (Clerk Doc. No. 252) is **GRANTED**;

D. Federal Defendants' Motion for Summary Judgment on the Claims by the Mandan, Hidasta and Arikara Nation (Clerk Doc. No. 339) is **GRANTED**; and

E. All other pending Motions are **DENIED** as moot.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: June 21, 2004

Paul A. Magnuson

United States District Court Judge

AMERICAN RIVERS, et al., Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, et al., Defendants. Civil No. 03-241 (GK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

271 F. Supp. 2d 230; 2003 U.S. Dist. LEXIS 12070; 57 ERC (BNA) 1106; 33 ELR 20239

July 12, 2003, Decided

OPINION BY: GLADYS KESSLER

### MEMORANDUM OPINION

Plaintiffs, a number of national and local environmental organizations, n1 brought suit against the United States Army Corps of Engineers ("Corps"), the Secretary of the Army, the United States Fish and Wildlife Service ("FWS"), and the Secretary of the Interior (collectively, "Defendants" or "Federal Defendants"), n2 seeking to protect the endangered least tern, the endangered pallid sturgeon, and the threatened Great Plains piping plover, all of which are protected by the Endangered Species Act ("ESA"), 16 U.S.C. § § 1531 et seq., Plaintiffs allege that the manner in which the Corps has operated the extensive dam and reservoir system on the Missouri River and the manner in which the FWS has carried out its statutory responsibilities under the ESA have adversely impacted the three species in question. Plaintiffs assert claims against the Corps and the Secretary of the Army under the ESA, the Flood Control Act of 1944 ("FCA"), 33 U.S.C. § § 701, et seq, and the Administrative Procedure Act ("APA"), 5 U.S.C. § § 701, et seq, and assert ESA and APA claims against FWS and the Secretary of the Interior.

n1 Plaintiffs are American Rivers, a national river conservation organization; Environmental Defense, a national conservation organization; National Wildlife Federation ("NWF"), a national conservation advocacy and education organization; Iowa Wildlife Federation, Kansas Wildlife Federation, Montana Wildlife Federation, Nebraska Wildlife Federation, North Dakota Wildlife Federation, and South Dakota Wildlife Federation, state affiliates of NWF; and Izaak Walton League of America, a national conservation organization, Maryland. Compl. at P 13.

n2 In addition to the primary parties, there are numerous intervenors and cross-claimants in this action. With regard to the Motions presently before the Court, the States of Nebraska and Missouri and the Missouri River Energy Service have filed briefs as Defendant Intervenors; the State of North Dakota has filed a brief as a Plaintiff-Intervenor.

This matter is now before the Court on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motions to Strike.  
 n3 A motions hearing in this matter was held on July 2, 2003. Upon consideration of the Motions, Oppositions, Replies, amicus curiae and intervenor briefs, the arguments presented at the motions hearing, and the entire record herein, for the reasons discussed below, Plaintiffs' Motion for Preliminary Injunction is **granted**, and Defendants' Motions to Strike are **denied as moot**.

n3 Federal Defendants' Motions to Strike Extra-Record Evidence, and State of Nebraska's Motion to Strike the Declarations in Support of Plaintiffs' Application for Preliminary Injunction both seek to strike expert declarations that Plaintiffs submitted with their Motion for Preliminary Injunction.

## I. SUMMARY



This is an immensely difficult case with great ramifications for the Missouri River Basin. Because of its complexity, it is important to clarify and summarize the factual and legal issues presented.

The Missouri River Basin--one of the largest and most bountiful in our country--is home to hundreds of species of birds, fish and insects, as well as the habitat which supports their existence. Three of those species--the least tern, the Great Plains piping plover, and the pallid sturgeon--are in great danger of extinction.

In 2000 the Fish and Wildlife Service issued, pursuant to the *Endangered Species Act*, a comprehensive Biological Opinion outlining what measures must be taken by the Corps of Engineers in its management of the Missouri River to insure the survival of those three species. These measures are necessary to both protect the three species from further harm and to affirmatively take action to insure their recovery. The Biological Opinion considered time to be of the essence in implementing them. The 2000 Biological Opinion was peer reviewed by government scientists and by an arm of the National Academy of Sciences. It is undisputed that all parties consider it to be the controlling biological opinion.

A central premise on which the 2000 Biological Opinion rests is the need to change the Corps' management of the Missouri River. In particular, the 2000 Biological Opinion calls upon the Corps to institute a water management regimen in which water flows will rise in the spring at least once every three years and decrease every summer. Adoption of this operating principle would: encourage breeding of the least tern and piping plover in the spring; avoid flooding of their nests and habitat, as well as killing of their chicks, in the summer; increase the numbers of prey-fish available for juvenile pallid sturgeon to feed on; and provide a more

receptive environment in which juvenile pallid sturgeon would thrive.

In October of 2002, the Corps released a draft Annual Operating Plan for the River presenting two potential flow regimes. Neither plan implemented the spring rise or summer flow regime that the 2000 Biological Opinion found necessary to protect the three species from extinction. When the Corps released its final Annual Operating Plan in January 2003, it contained no provision for a spring rise and low summer flow regime for managing the River. Plaintiffs in this case then filed suit, seeking to force the Corps and FWS to comply with federal law and protect these three endangered and threatened species.

In 2003, the Fish and Wildlife Service did a total about-face, issuing a new Biological Opinion that reversed the position it took in 2000. Looking only at Corps activities in the summer of 2003, FWS concluded that the three species could survive one more summer without the summer low flow that was previously deemed essential to both avoid current harm and advance future recovery. Moreover, FWS stated that its change of position rested on the assumption that the Corps' future management of river flows would be consistent with the recommendations made in the 2000 Biological Opinion.

There is no question that the three species (the least tern, the piping plover, and the pallid sturgeon) will suffer irreparable harm if the Corps is allowed to carry out its 2003 Annual Operating Plan. Two of those species--the least tern and the pallid sturgeon--have been declared "endangered" under the *Endangered Species Act* and are on the verge of extinction; the piping plover has been declared "threatened," which means that without protection, it will also face extinction. There is no dollar value that can be placed on the

extinction of an animal species--the loss is to our planet, our children, and future generations.

Upon analysis of the lengthy legal arguments presented by all parties, the Court finds that there is a substantial likelihood that Plaintiffs will prevail on the merits of their case for the following reasons: FWS has failed to adequately explain or justify its reversal of position from its 2000 Biological Opinion to its 2003 Biological Opinion; FWS' 2003 Supplemental Biological Opinion is premised on a totally baseless assumption--namely that the Corps will adopt a River management plan for 2004 that will be consistent with the 2000 Biological Opinion; and FWS' 2003 Supplemental Biological Opinion improperly segments its analysis and narrowly focuses on harms to the species only during this summer instead of considering all present and future effects on the three imperiled species. Finally, because the 2003 Supplemental Biological Opinion is arbitrary and capricious, it cannot serve to validate the Corps' management plan that will lead to harm of these three species in violation of the *Endangered Species Act*.

In addition to the irreparable harm to the three protected species and the likelihood that Plaintiffs will ultimately succeed in their case against the Corps and FWS, the Court must also consider and balance the various impacts of granting an injunction. There is no question that other interests will suffer if the preliminary injunction that Plaintiffs request is granted. Commercial and consumer interests in the lower Basin states, such as Nebraska and Missouri, will be affected. Navigation will be interrupted for the remainder of the summer and barge companies will lose revenues. Water quality may be affected and there may well be higher water purification costs. Hydroelectric resources will be affected, and consumers may suffer higher costs. However, despite a similar--but shorter--interruption of high water flows last summer caused by drought, none of the

Defendants or Intervenor could provide the Court with reliable figures on the extent or certainty of losses. Significantly, when the Corps previously examined the effects of implementing a management plan with summer low flow, it concluded that it would produce an overall net economic benefit to the entire Missouri River Basin.

Balancing the irreplaceable and unquantifiable loss of three species against the concrete--albeit uncertain--impacts on consumers, businesses, and the economies of several States is a daunting task. However, the loss of species is just that--irreplaceable. The American people, through their representatives in Congress, have spoken in the "plainest of words" making it abundantly clear that the protection and preservation of endangered species is one of the nation's highest priorities. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978). For these reasons, as more thoroughly explained in this Memorandum Opinion, the Court concludes that the Plaintiffs' request for a preliminary injunction should be granted.

## II. BACKGROUND

The Missouri River flows 2,340 miles from its head waters near Three Forks, Montana, to its confluence with the Mississippi River at St. Louis, Missouri. The Missouri River Basin covers the states of Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, and Wyoming, as well as a small part of Canada. Approximately ten million people, including 28 Native American Tribes, live in the Basin.

### A. The Flood Control Act

Pursuant to the FCA, Pub.L. No. 78-534, 58 Stat. 887 (1944), and several other federal statutes, Congress entrusted

the Corps with managing the Missouri River Basin through its construction and operation of the Missouri River Main Stem System of Dams and Reservoirs ("Main Stem System"). 58 Stat. 591. In completing the Main Stem System, the Corps constructed six dams and reservoirs, n4 on the upper part of the Missouri River and narrowed and deepened the lower part of the river for commercial barging. Under the FCA, the Corps is responsible, not only for constructing and managing various dams and their corresponding reservoirs, 16 U.S.C. § 460d, but also for contracting for use of surplus reservoir water and promulgating regulations for the use of water stored in the reservoirs, 33 U.S.C. § 708, 709. The FCA also identified various substantive interests that the Corps was to consider in managing the Missouri River Basin, such as flood control and navigation, as well as irrigation, recreation, fish, and wildlife. See 58 Stat. at 889-91. Thus, in enacting the FCA, Congress "provided the Corps with a wide array of interests to consider in regulating the River." *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1020 (8th Cir. 2003).

n4 The dams and their associated reservoirs are located in Montana, North Dakota, South Dakota and Nebraska. They include Ft. Peck Dam (Ft. Peck Lake), Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Ft. Randall Dam (Lake Francis Case), and Gavins Point Dam (Lewis & Clarke Lake).

### **1. The Master Manual and Annual Operating Plans**

In order to fully consider the wide array of interests the FCA requires the Corps to balance in its management of the Missouri River, the Corps adopted a specific management plan, called the Missouri River Main Stem Reservoir System Reservoir Regulation Manual, or Master Manual, in 1960. Section 9 of the Master Manual sets out a general approach for reservoir operation projects, with a sequential consideration of the various interests identified in the FCA itself. Thus, the Master Manual directs the Corps to consider,



in order of priority, flood control, irrigation, water supply and water-quality requirements, navigation and power, and finally recreation, fish, and wildlife. See Fed. Defs.' Ex. 2 ("Master Manual") at IX-1,2.

In addition to this general approach, the Master Manual includes, specific technical guidelines for minimum water flows that are to be maintained along the River and methods for calculating the length of the navigation season based upon that minimum water flow at certain times of the year. Master Manual Section at IX-6-9. The Master Manual also directs the Corps to develop Annual Operating Plans ("AOPs"), describing the Corps' management plan for operating the Missouri River water flow in each water year. Master Manual at IX-20, pts. 9-47, 48.

Since its original promulgation in 1960, the Corps has revised the Master Manual three times--in 1973, 1975, and 1979. The Corps has been in the process of producing the latest revision of the Master Manual since the late 1980's. However, after more than ten years of work and multiple assurances to various courts that the latest revision would soon be completed, see *South Dakota v. Bornhoft*, No. CV 91 26 JDS-BLG, slip op. (D. Mont. Feb. 3, 1993), Ex. 7 to Pls.' Schneider Decl. and *Ubbelohde*, 330 F.3d at 1020, the Corps has not yet completed its revision of the Master Manual. The present management of the River is still based on the general approach articulated in the 1979 version of the Master Manual.

## **2. Prior FCA Litigation Involving the 2002 AOP**

In response to severe drought conditions that the Missouri River Basin has been experiencing for the past few years, a series of cases were filed in the courts of the Eighth Circuit during the 2002 water year, challenging the Corps' operation of the Main Stem System under the APA and the



FCA. n5 The unavoidable management constraints caused by the drought led to sharp conflicts amongst the Upper Basin and Lower Basin states as to the priority to be given in the Corps' formulation of the 2002 AOP for allocating the limited supply of water from the Missouri River.

n5 For a thorough description of the various cases against the Corps relating to the 2002 Water Year, see *Ubbelohde*, 330 F.3d at 1020-22.

The Corps' 2002 AOP provided that water from a reservoir in South Dakota would be released to maintain downstream navigation on the Missouri River while water levels at the other five reservoirs would be held constant. In order to protect recreational fishing interests, the State of South Dakota filed suit in the federal District Court in South Dakota, and the District Court entered a temporary restraining order, and then a preliminary injunction, requiring the Corps to maintain the water level at South Dakota reservoirs until the end of the spawning season. See, generally, *Ubbelohde*, 330 F.3d at 1021 (describing the events in *South Dakota v. Ubbelohde*, Civ. No. 02-3011 (D.S.D.)).

The Corps then announced plans to lower water levels in a North Dakota reservoir in order to achieve the same goal and, predictably, the State of North Dakota brought suit in the federal District Court in North Dakota to enjoin the Corps from lowering the reservoir. The District Court in North Dakota then entered a temporary restraining order, which was later converted into a preliminary injunction, requiring the Corps to maintain that reservoir's water level. See, generally, *Ubbelohde*, 330 F.3d at 1021-22 (describing the events in *State of North Dakota v. Ubbelohde*, Civ. No. A1-02-059 (D.N.D.)).

In response to these injunctions that would have harmed downstream navigation interests, the State of Nebraska went to the federal District Court in Nebraska seeking to require the Corps to manage the Missouri River according to the Master Manual and the 2002 AOP. The District Court in Nebraska subsequently entered an injunction ordering the Corps to abide by the Master Manual and 2002 AOP to provide for downstream navigation. See, generally, *Ubbelohde*, 330 F.3d at 1022 (describing the events in *Nebraska v. Ubbelohde*, Case No. 8-02CV217 (D. Neb.)).

The Corps immediately appealed each of these injunctions and the Eighth Circuit stayed them on May 22, 2002, noting that "the injunctions in North Dakota and South Dakota expired by their own terms on May 25, 2002," although the injunction in Nebraska did not expire. *Ubbelohde*, 330 F.3d at 1022. On June 4, 2003, the Eighth Circuit struck down the North Dakota and South Dakota injunctions while upholding the Nebraska injunction. The court found that the North Dakota and South Dakota injunctions were not based on a likelihood of success on the merits. The court held that the 2003 AOP was not arbitrary and capricious because the Corps had "provided a rational basis for its decision to lower one reservoir per year during drought conditions." *Id.*, at 1032. The court also found that the Nebraska District Court's injunction was appropriate because the Master Manual was binding upon the Corps, and therefore the Corps could be ordered to "abide by its own formally adopted policies" in the Master Manual requiring it to manage the River to maintain downstream navigation. *Id.*, 330 F.3d at 1033. The *Endangered Species Act* was never mentioned in the Eighth Circuit opinion.

### **B. The Endangered Species Act**

In 1973, Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species and

threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species." 16 U.S.C. § 1531(b). At that time, the ESA "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978) ("TVA").

Under Section 4 of the ESA, the appropriate government agency, in this case FWS, conducts a review of the species' biological status and threats to its existence, and then lists the species as either threatened or endangered based on the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Section 4 also requires the listing agency to designate "critical habitat" for endangered and threatened species, i.e., those areas with physical and/or biological features essential for conservation of the species. 16 U.S.C. § 1533(b)(2). Subsequently, listed species and critical habitat are afforded considerable protections, and all federal agencies must assume special responsibilities to conserve them.

Under Section 7 of the ESA, every federal agency must "insure" that "any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of the endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). In order to avoid jeopardy to endangered and threatened species, federal agencies are required to verify that their actions will not jeopardize any listed species by consulting with and obtaining the assistance of specific federal consultation agencies, such as the Secretary of Interior acting through the FWS. 16 U.S.C. § 1536(b)(4). Federal agencies must use "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), to determine if any listed species is present in the area affected by a proposed project and must confer with

the Secretary whenever an action is likely to affect such a species. *16 U.S.C. § 1536(a)(3)*.

As a result of Section 7's consultation requirement, FWS formulates a Biological Opinion ("BiOp")--a comprehensive examination of "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." *16 U.S.C. § 1536(b)(3)(A)*; *50 C.F.R. § 402.02*. If the BiOp concludes that the proposed agency action will jeopardize a listed species, the BiOp must include the reasonable and prudent alternatives ("RPAs"), "if any," to the agency's action plans. *Id.*

Under Section 9 of the ESA, it is unlawful for any person to "take" a listed species. *16 U.S.C. § 1538(a)(1)(B)*. Accordingly, if FWS determines that the action agency's implementation of RPAs could still result in "an incidental taking" of the listed species, FWS must issue an Incidental Take Statement. That Statement authorizes a specified level of "incidental take" of listed species that "result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency." *50 C.F.R. § 402.02*; see also *16 U.S.C. § 1536(b)(4)*. An incidental take statement must specifically state the impact that agency take will have on the species, identify the "reasonable and prudent measures" ("RPMs") considered necessary to minimize the expected impact, and establish "terms and conditions" necessary for implementation of the RPMs. *16 U.S.C. § 1536(b)(4)*; see also *50 C.F.R. § 402.14(i)*. Under the ESA, a take that complies with an Incidental Take Statement is exempt from the ESA's prohibitions and penalties against taking a listed species, *16 U.S.C. § 1536(o)(2)*. If the agency fails either to implement the RPMs or to comply with the terms and conditions of the statement, any take is unlawful. *50 C.F.R. § 402.14(i)(5)*.

## 1. Listing of Species in the Missouri River Basin

Since the enactment of the ESA, a number of species that reside in the Missouri River Basin have been listed as threatened or endangered due to the Corps' physical alteration of the Missouri River and its manipulation of the River's water flow.

In 1985, FWS listed the least tern (*Sterna antillarum*), a small, fish-eating bird that historically nested on exposed sandbars on the Mississippi and Missouri Rivers. In listing the tern as endangered, FWS found that the Corps' alteration of Missouri River flow patterns had destroyed the sandbars necessary for the species to nest and raise its chicks. 2000 BiOp at 84.

The Great Plains piping plover (*Charadrius melodus*) is a migratory bird, which grows to approximately seven inches in length and, like the least tern, uses exposed sandbars for its nesting and forage sites. In 1986, FWS listed the Great Plains piping plover as threatened, finding that the Corps' "damming and channelization of rivers [had] eliminated nesting sandbar habitat along hundreds of miles of rivers in the Dakotas, Iowa, and Nebraska." 50 *Fed. Reg.* 50,731. Subsequently, in September 2002, FWS designated approximately 767 miles of the Missouri River as critical habitat for the piping Plover, finding that the features and habitat characteristics of those portions of the Missouri River were essential to plover survival. 67 *Fed. Reg.* 57,638, 57,642.

The pallid sturgeon (*Scaphirhynchus albus*) is a large fish that exists primarily in the Missouri River, can live more than fifty years, and can grow to more than six feet in length and 80 pounds in weight. Pallid sturgeon naturally spawn in the spring, cued by rising water levels and water temperatures, 2000 BiOp at 103, and juvenile sturgeon spend



the summer and fall in shallow, slow flowing water foraging on populations of small fish found in those waters. 2000 BiOp at 112-113. In 1990, FWS listed the pallid sturgeon as endangered, finding that "alteration of habitat through river channelization, impoundment, and altered flow regime has been a major factor in the decline of this species." 55 *Fed. Reg.* 36,645.

## **2. History of the Corps' ESA Consultation for the Missouri River Basin**

### **a. The 1990 BiOp**

In 1989, the Corps initiated formal consultation with FWS under *Section 7 of the ESA*, after FWS listed the tern and plover under the ESA. In November 1990, FWS issued a biological opinion (the "1990 BiOp") and concluded that the Corps' dam operations on the Missouri River were jeopardizing the survival of the two listed birds by directly "taking" these species through flooding of their nests and damaging their habitats in other enumerated ways. 2000 BiOp at 5, 206.

Beginning in 1991, FWS advised the Corps that it needed to supplement the 1989 consultation for the following reasons: the listing of the pallid sturgeon as an endangered species, the Corps' lack of compliance with the bird RPAs in the 1990 BiOp, and "significant changes to [the Corps'] annual operations since 1990 [BiOp]." 2000 BiOp at 1. The Corps initiated informal consultations relating to its, specific actions managing the Missouri River but held off initiating a formal consultation until "sufficient data on project effects and pallid sturgeon life history and habitat use were available as part of the Master Manual Review and Study." *Id.*

In 1993, the Corps initiated formal *ESA Section 7* consultation with FWS regarding revision of the Master



Manual, and in April 1994, FWS produced a draft BiOp to be used in the Master Manual revision process. 2000 BiOp at 7, 9. However, after numerous extensions of the Master Manual consultation, the Corps never provided any comments on the 1994 draft BiOp. Id. at 10. In 1997, FWS requested that the Corps reinitiate consultation under the present Master Manual (which was still the 1979 version), given that the "(1) reasonable and prudent alternatives of the 1990 consultation and Biological Opinion for meeting interior least tern and piping plover fledgling ratios and habitat have not been met, (2) reasonable and prudent measures to minimize take have not been met, (3) the terms and conditions that implement the reasonable and prudent measures have not been met, and (4) the Corps has not complied with the annual reporting requirements of the reasonable and prudent alternatives." Ex. 9 to Pls.' Schneider Decl. at 1 (letter from FWS to the Corps). Finally, in March 2000, the Corps reinitiated consultation with FWS under the still-existing 1979 version of the Master Manual. Id. at 24.

#### **b. The 2000 BiOp**

In November 2000, FWS issued the 2000 BiOp, which concluded that the Corps' management of the Missouri River under the 1979 version of the Master Manual was "likely to jeopardize the continued existence of the least tern, piping plover, and pallid sturgeon." 2000 BiOp, Executive Summary at 1-2. In the 2000 BiOp, FWS presented an RPA with multiple parts that was "designed to return some semblance of practical 'form and function' of a river system" that through a "combination of all parts of the [RPA], working in concert, [would] eliminate jeopardy to the [three] species." Id. at 2.

The five parts of the RPA contained in the 2000 BiOp are: 1) flow enhancement through a spring rise and summer low flow which is necessary to restore "spawning cues for

fish, maintain and develop sandbar habitat for birds and fish, ... and improve habitat conditions for summer nesting terns and plovers, forage availability, and fish productivity," 2) habitat restoration, creation, and requisition, with a goal of "20-30 acres of shallow water [ ] per mile," 3) unbalanced system regulation for water levels at the upper three reservoirs "by holding one reservoir low, one at average levels, and one rising on a 3-year rotation," 4) adaptive management and monitoring which would allow the Corps to efficiently modify and implement management plans "in response to new information and to new environmental conditions to benefit the species," and 5) increased propagation and augmentation of pallid sturgeon. *Id.* at 2-3.

The Incidental Take Statements included in the 2000 BiOp allowed the Corps to harm a limited number of each of the three listed species, so long as the RPA was implemented. *Id.* at 270, 276-77. Finally, while noting the necessity to implement the flow changes for protecting the species as soon as possible, FWS still gave the Corps until the 2003 water year to implement the yearly low summer flow and once per three year spring rise. *Id.* at 243.

FWS' findings in the 2000 BiOp were supported by two independent scientific reviews. First, a panel of scientists chosen jointly by FWS and the Corps concluded that restoring a more natural flow regime to the Missouri River was necessary for the survival and recovery of the three listed species. See, generally, 2000 BiOp, App. V. Second, the National Academy of Sciences' ("NAS") review of the 2000 BiOp confirmed that the Corps' current management of river flow, if unchanged, would cause jeopardy to the three listed species. See, generally, National Research Council, "The Missouri River Ecosystem: Exploring the Prospects for Recovery" (2002) ("NAS Report"), Ex. 2 to Pls.' Keenlyne Decl. NAS concluded that a more natural water flow needed to be implemented on the Missouri River to stop degradation

of the habitat and cautioned that without changes to flow regime, the Missouri River ecosystem "faces the prospect of irreversible extinction of species." NAS Report at 3.

After FWS issued the 2000 BiOp, the Corps analyzed the economic impact the summer low flow regime would have on hydroelectric power, water supply, flood control, navigation, and recreation interests. In August 2001, the Corps issued its revised draft environmental impact statement ("RDEIS") for the Missouri River Basin. See RDEIS, Ex. 2 to Pls.' Schneider Decl. The Corps concluded that implementation of the flow changes required by the 2000 BiOp, instead of continuing with the management regime articulated in the Master Manual, would produce a total net economic benefit for the entire Missouri River Basin system of approximately \$ 8.8 million annually. RDEIS at 5-131, Table 5.13-1. In addition, the Corps found that implementation of the 2000 BiOp's adaptive management flow regime would reduce the economic benefits of flood control approximately 1%. See RDEIS at 26.

### **3. The 2003 Water Year and Plaintiffs' Present Lawsuit**

#### **a. The 2003 AOP**

On October 3, 2002, the Corps released a draft 2003 AOP to the public. The draft 2003 AOP outlined two potential flow regimes that would be implemented for the 2003 water year in order to "meet minimum services to navigation from 1 April through 1 December 2003," Ex. 10 to Pls.' Schneider Decl. at 1 (letter from Corps to FWS). Neither of these two options implemented the spring rise or low summer flow regime required by the 2000 BiOp's adaptive management RPA.

The first plan called for a steady, high-flow release of reservoir water for the entire summer, while the second plan abandoned a high steady flow regime in favor of a variable "flow-to-target" regime, in which the Corps would release water at the rate required to meet specific navigation targets downstream. See, generally, 2002-2003 AOP, Ex. 11 to Pls.' Schneider Decl. While the terms of the 2000 BiOp allowed the Corps to delay implementation of a spring rise due to the continuing drought in the Missouri River Basin, no such exception for lack of a summer low flow was included in the 2000 BiOp. However, the Corps still asserted that its draft 2003 AOP was in compliance with the 2003 Supplemental BiOp. Ex. 10 to Pls.' Schneider Decl. at 2 (letter from Corps to FWS).

On November 7, 2002, Plaintiffs filed a 60-day notice letter with the Corps, indicating their intent to sue under the ESA for the 2003 AOP's non-compliance with the 2000 BiOp. See 16 U.S.C. § 1540(g)(2)(A)(i) (requiring that under the statute's citizen suit provision, plaintiffs give federal defendants notice of their intent to sue at least 60 days before filing an ESA action). In January 2003, the Corps released the final 2003 AOP, which contained the two alternative flow regimes identified in the draft AOP and did not include any plan that conformed to the low summer flow articulated in the 2000 BiOp. Accordingly, Plaintiffs filed the present action on January 12, 2003. n6

n6 Shortly thereafter, on February 21, 2003, the Federal Defendants moved to transfer this case to the District Court for the District of Nebraska, arguing that interest of justice strongly favored transfer to that court. On May 21, 2003, after consideration of the arguments made by the multiple parties and intervenors, the Court denied the Motion to Transfer, finding that "consideration of both the private and public interests support adjudication of the matter in the District of Columbia." 5/21/03 Slip Op. at 16.

**b. ESA Consultation on the 2003 AOP, the Corps' Revised Operating Plan for 2003, and the 2003 Supplemental BiOp**

Shortly after Plaintiffs filed this ESA action, the Corps provided FWS with the information necessary to carry out the formal consultation it had requested earlier, after recognizing that the alternatives outlined in the 2003 AOP "might also affect two endangered species--the interior least tern and the piping plover." Fed. Defs.' Opp'n at 9-10. n7 As a result of this consultation, the Corps issued an Additional Supplemental Biological Assessment for the 2003 AOP on April 4, 2003, and FWS issued a 2003 Supplemental BiOp on April 21, 2003. n8

n7 In fact, the piping plover is threatened, not endangered.

n8 In response to the issuance of these post-consultation documents, on May 8, 2003, Plaintiffs filed an unopposed Motion for Leave to File First Amended and Supplemental Complaint, which was granted by the Court.

The Additional Supplemental Biological Assessment for the 2003 AOP presented a revised operating plan for the remainder of the 2003 water year. The revised 2003 operating plan implemented a hybrid approach to management of the Missouri River Basin that would maintain relatively high flows throughout the summer to support downstream navigation by combining "steady-state" flow releases maintained at 26 to 27 Kcfs until midsummer, at which time, the Corps plans to switch to flow-to-target operations with increasing flows to support navigation. Additional Supplemental Biological Assessment at 2-3, Ex. 16 to Pls.' Schneider Decl. To date, the Corps has not issued this revised operating plan as a formal revision to the 2003 AOP.



FWS stated that a supplemental BiOp for the 2003 water year was needed due to "new information" that had become available since the 2000 BiOp had been completed, such as increases in tern and plover fledge ratios and habitat restoration efforts the Corps had implemented. 2003 Supplemental BiOp at 2-3, 6, Ex. 17 to Pls.' Schneider Decl. The. 2003 Supplemental BiOp issued by FWS analyzed the impact of the Corps' 2003 AOP on the three protected species and concluded that

the revised proposed operation (i.e., 26-27 Kcfs [thousand cubic feet per second] flat release with subsequent flow-to-target) for the period from May 1 through August 15, 2003, in combination with all other aspects of the RPA from the [2000 BiOp], is a suitable replacement for the summer low flow component of the RPA for that time period only.

#### 2003 Supplemental BiOp at 13..

Generally, FWS found that the Corps did not need to implement the flow changes recommended in the 2000 BiOp's RPA during the 2003 water year because the effect of take and harm that would result from implementation of the 2003 AOP would not cause the three species irreversible harm. Accordingly, the 2003 Supplemental BiOp included an Incidental Take Statement that allowed take of eggs and chicks of 4-50 least terns and 11-71 piping plovers during the period at issue, 2003 Supplemental BiOp at 15 (variable take amounts dependant on exact flow rate), while explaining that there would be "no take for pallid sturgeon beyond that described in the 2000 [BiOp]," *id.* at 14.

However, the 2003 Supplemental BiOp still identified the 2000 BiOp as "the controlling biological opinion." 2003 Supplemental BiOp at 13. The 2003 Supplemental BiOp acknowledged that if the Corps' operations in the Missouri



River Basin were to continue to take the species at the level allowed in the 2003 Supplemental BiOp, it would increase the likelihood of "quasi-extinction" in the piping plover up to 68%, *id.* at 6, and anticipated that the Corps' implementation of the revised 2003 AOP would result in take of up to 7.5% of the least tern population, *id.* at 15. The 2003 Supplemental BiOp's treatment of the pallid sturgeon was quite sparse given that the "effects to pallid sturgeon during this short duration (May 1 - August 15), one-time operation are difficult to assess." *Id.* at 12. Thus, FWS' conclusions in the 2003 Supplemental BiOp were "specific to the 2003 operating year with the understanding that future operation will be consistent with the November 2000 biological opinion or an operational alternative (i.e., new Master Manual) provided by the Corps that removes jeopardy." *Id.* at 10.

On May 23, 2003, Plaintiffs filed their Motion for Preliminary Injunction seeking to enjoin the Corps from implementing its revised 2003 AOP this summer and requiring the Corps to comply with the low summer flow requirements set out in the 2000 BiOp.

### **III. Analysis**

#### **A. Procedural Arguments**

##### **1. Plaintiffs' Claims Are Not Procedurally Barred under the ESA's 60-Day Notice Period.**

Defendant-Intervenor State of Nebraska argues that Plaintiffs are procedurally barred from seeking preliminary injunctive relief for failure to comply with the ESA's mandatory 60-day notice requirement with respect to the 2003 Supplemental BiOp and the Corps' subsequent revisions to the 2003 AOP. See 16 U.S.C. § 1540(g)(2)(A)(i). It is undisputed that on November 7, 2002, Plaintiffs did comply

with the ESA's mandatory 60-day notice by filing notice with the Corps and FWS of their proposed ESA challenge to the draft 2003 AOP's non-compliance with the 2000 BiOp.

As for Plaintiffs' additional ESA claims with regard to the 2003 Supplemental BiOp and revised 2003 AOP, the Court concludes that Plaintiffs' November 2002 filing put the Federal Defendants on adequate notice that Plaintiffs would seek, through litigation, to make them comply with ESA requirements in the management of the Missouri River Basin during the 2003 water year. See *Southwest Center for Biological Diversity v. United States Forest Service*, 307 F.3d 964, 975 (9th Cir. 2002) (where plaintiffs had given an agency 60-day notice to sue for failure to perform ESA consultation, that notice was sufficient to challenge the consultation that took place after the notice was served because the agency "would not have reasonably interpreted the initial complaint at issue as one that simply sought consultation in and of itself regardless of the validity of the consultation."); *Water Keeper Alliance v. United States Department of Defense*, 271 F.3d 21, 30 (1st Cir. 2001) (the ESA's 60-day notice provision was satisfied with regard to claims challenging some activity that occurred after the notice had been sent because the original notice made it sufficiently clear to the agency that the plaintiffs "intended to challenge an ongoing delinquency in the preparation of a biological assessment.").

Accordingly, Plaintiffs are not procedurally barred from seeking preliminary injunctive relief for failure to comply with the ESA's mandatory 60-day notice requirement with respect to their claims challenging the 2003 Supplemental BiOp and revisions to the 2003 AOP.

## **2. The Court Need Not Rely on Plaintiff's Expert Declarations in Issuing This Decision.**

In addition to their general opposition to Plaintiffs' Motion for Preliminary Injunction, both the Federal Defendants and the State of Nebraska have filed Motions to Strike the expert declarations that Plaintiffs submitted in support of their Motion for Preliminary Injunction. The Federal Defendants and Nebraska argue that this extra-record evidence is impermissible, under the APA's limitation on "the scope of judicial review...to the administrative record that was before the Secretary at the time that he or she made the decisions." Fed. Defs.' Mot. at 5 (citing *Environmental Defense Fund v. Costle*, 211 U.S. App. D.C. 313, 657 F.2d 275, 285 (D.C. Cir. 1981)). n9

n9 Ironically, while moving to strike Plaintiffs' expert declarations, the Federal Defendants filed an expert declaration in support of their own opposition brief, as did Defendant-Intervenor State of Missouri.

While it is true that "as a general rule, plaintiffs may not supplant or supplement the administrative record," Fed. Defs.' Mot. at 6. (citing *Peterson Farms I v. Madigan*, 1992 WL 118370 (D. D.C. 1992)), this Circuit has recognized that courts may consider extra record evidence in its review of agency actions under certain circumstances. See *Costle*, 657 F.2d at 286. (recognizing "a judicial venture outside the record... [for] background information, or to determine the presence of the requisite fullness of the reasons given"). The D.C. Circuit has also recognized that federal case law supports exceptions to the general rule prohibiting review of extra-record evidence in instances

(1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; ... (5) in cases where evidence arising after the agency action shows whether the decision was correct or

not; ... and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

*Esch v. Yeutter*, 278 U.S. App. D.C. 98, 876 F.2d 976, 991 & n. 166 (D.C. Cir. 1989) (citing Stark & Wald, Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action, 36 *Admin.L.Rev.* 333, 345 (1984)). In fact, a number of District Court decisions in this Circuit have acknowledged that the *Esch* decision described the instances in which supplementation of the administrative record is allowed. See Pls.' Opp'n at 12, n.18. n10

n10 Citing *Carlton v. Babbitt*, 26 F. Supp. 2d 102, 108 (D.D.C. 1998) for admission of an expert's declaration in an ESA case under the *Esch* exceptions; *Southwest Ctr. For Biological Diversity v. Norton*, 2002 U.S. Dist. LEXIS 13661, Civ. Action No. 98-934 (RMU/JMF), 2002 WL 1733618, at \*7 (D.D.C. July 29, 2002) for application of the fifth *Esch* exception for "evidence arising after the agency action"; *Nat'l Trust For Historic Pres. v. Blanck*, 938 F. Supp. 908, 916 (D.D.C. 1996) for recognition of the *Esch* exceptions to the general rule, especially with regard to preliminary injunctions; and *LeBoeuf, Lamb, Greene & MacRae, LLP v. Abraham*, 215 F. Supp. 2d 73, 82 (D.D.C. 2002) and *Holy Land Found. For Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 66 n.9 (D.D.C. 2002) for recognition of the *Esch* exceptions to the general rule.

Thus, the Court concludes that this case fits squarely within one of our Circuit's stated exceptions for allowing consideration of extra-record declarations in administrative review cases--cases involving preliminary injunctions. See *Esch*, 876 F.2d at 991 (exception 7 for "cases where relief is at issue, especially at the preliminary injunction stage."). The Court also notes that if it adopted the narrow rule endorsed by the Federal Defendants and Nebraska barring consideration of all extra-record evidence, defendants could easily defeat requests for relief in almost all cases, especially

those of a technical nature in which a complete agency record had not been produced. n11

n11 The Court finds that this same reasoning defeats the State of Nebraska's argument that any ruling on the Plaintiffs' APA claims is inappropriate given the absence of a complete administrative record. While the Corps filed its Administrative Record with the Court on July 8, 2003, FWS is not expected to file its record until July 16, 2003, after the Corps plans to implement its summer flow changes. If courts were strictly precluded from ruling on cases in which a complete administrative record was not available, the government could always block requests for preliminary injunctive relief by delaying production of the administrative record. See *Cascadia Wildlands Project v. United States Fish & Wildlife Service*, 219 F. Supp. 2d 1142, 1150 (D.Or. 2002) (granting a preliminary injunction until such time when "a full record will be available for review").

Plaintiffs have presented numerous documentary exhibits in support of their motion, in addition to their expert declarations. The Federal Defendants do not object to consideration of these documents, which they concede will be part of the administrative record. n12 Consequently, the Court finds that this documentary evidence is sufficient to reach a decision at this time, and thus has no need to rely on Plaintiffs' contested expert declarations in doing so. n13

n12 The State of Nebraska moves to strike all declarations submitted by Plaintiffs. However, the Federal Defendants have not moved to strike the Schneider Declaration, which consists primarily of a list of the documentary exhibits attached to it. As the Federal Defendants are best able to assess which documents will be included in the administrative record, the Court will rely upon the Schneider Declaration in reaching its decision. In fact, the Administrative Record filed by the Corps on July 8, 2003, includes most, if not all, of those exhibits. See Fed. Defs.' Notice of Filing of Administrative Record ("Corps A.R."), Ex.



1, 2 (index of documents contained in the administrative record).

n13 The Court notes that it has appropriately relied upon some documentary exhibits attached to the expert declarations in order to obtain a thorough background of the case. See *Costle*, 657 F.2d at 286. In fact, the Corps' Administrative Record includes one such exhibit referenced by the Court. See, e.g., NAS Report, Ex. 2 to Pls.' Keenlyne Decl. and Corps A.R., Doc. 1521.

## **B. Standard of Review for Preliminary Injunctions**

Our Circuit generally applies a traditional four-part test to determine whether to grant a request for a preliminary injunction. *Ashkenazi v. Attorney Gen. of the United States*, 246 F. Supp. 2d 1, 3 (D.D.C. 2003) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-12, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982); *National Wildlife Federation v. Burford*, 266 U.S. App. D.C. 241, 835 F.2d 305 (D.C. Cir. 1987)). To obtain preliminary injunctive relief under this traditional test, a plaintiff has the burden of demonstrating: "1) a substantial likelihood of success on the merits, 2) that [plaintiff] would suffer irreparable injury if the injunction is not granted, 3) that any injunction would not substantially injure other interested parties, and 4) that the public interest would be served by the injunction." *Katz v. Georgetown University*, 345 U.S. App. D.C. 341, 246 F.3d 685, 687-88 (D.C. Cir. 2001); *Ashkenazi*, 246 F. Supp. 2d at 3.

However, Plaintiffs argue that in injunction actions involving application of the ESA, a different test must be applied. See, *National Wildlife Federation v. Burlington N.R.R.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994) ("traditional test for preliminary injunctions...is not the test for injunctions under the *Endangered Species Act*"). Plaintiffs argue that in upholding the ESA's central goal of protecting endangered or threatened species, courts have held that a preliminary

injunction can be granted under the ESA when the moving party "1) has had or can likely show 'success on the merits,' and 2) makes the requisite showing of 'irreparable injury.'" *Southwest Center for Biological Diversity v. United States Forest Service*, 307 F.3d 964, 972 (9th Cir. 2002) (internal quotations and citations omitted). See also *Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1355 (D. Minn. 1988) ("traditional balancing of equities [for issuance of an injunction under the ESA] is abandoned in favor of an almost absolute presumption in favor of the endangered species") (emphasis added), aff'd in part, rev'd in part on other grounds, 882 F.2d 1294 (8th Cir. 1989); *Strahan v. Cox*, 127 F.3d 155, 160 (1st Cir. 1997) (applying a two-part preliminary injunction standard to ESA cases because "the balancing and public interest prongs have been answered by Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species") (internal citations and quotations omitted); but see *Water Keeper Alliance*, 271 F.3d at 34 (applying a four-part standard under the ESA because of the case's national security").

Application of a two-part test for ESA claims flows from the Supreme Court's conclusion that Congress spoke in the "plainest of words" in enacting the ESA, "making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *TVA*, 437 U.S. at 194. Thus, courts have ruled that they could not "use equity's scales to strike a different balance." *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982) (in comparing the ESA with the *Clean Water Act*, the Court stated that its *TVA* decision was based on an understanding that under the ESA, Congress had "foreclosed the exercise of the usual discretion possessed by a court of equity"); *Burlington N.R.R.*, 23 F.3d at 1511 (in ESA cases, "Congress removed from the courts their traditional equitable discretion in injunction proceedings of

balancing the parties' competing interests"); *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066, 1072 (W.D. Wash. 2002) (applying a two-part test because "the balance of the hardships has already been struck in favor of endangered species").

Defendants argue that the District Court judges in this Circuit have "continued to apply [the] four-part balancing test in ESA cases." Fed. Defs. Opp'n at 17 (citing *Fund For Animals v. Turner*, 1991 U.S. Dist. LEXIS 13426, 1991 WL 206232 at \*1 (D.D.C. 1991); *North Slope Borough v. Andrus*, 486 F. Supp. 326, 329-332 (D.D.C. 1979) (both applying the traditional four-part balancing test in an ESA case)).

While this Court concludes that Congress has spoken clearly in the ESA and "that the balance has been struck in favor of affording endangered species the highest of priorities," *TVA*, 437 U.S. at 194, it is also true that our Circuit has not definitively ruled on the issue. Consequently, out of an abundance of caution, this Court will choose the most conservative alternative and apply the four-part test.

### **C. Plaintiffs Are Likely to Succeed on the Merits of Their APA and ESA Claims.**

Plaintiffs' Motion for Preliminary Injunction argues that they are likely to succeed on the merits of their claims that the FWS' 2003 Supplemental BiOp violates the APA and the ESA, and that under the controlling 2000 BiOp, the Corps' 2003 management of the Missouri River Basin pursuant to the 2003 AOP (by virtue of regulating the flow of the River) violates the ESA and the APA. Essentially, Plaintiffs argue that the 2003 Supplemental BiOp is arbitrary and capricious under the APA because it is poorly reasoned and fails to adequately explain FWS's decision to depart from the adaptive management RPA contained in the 2000 BiOp.

Plaintiffs also argue that the Corps' 2003 AOP violates the ESA because it fails to avoid jeopardy to the species and results in a take of the three species not allowed by the Incidental Take Statement contained in the controlling 2000 BiOp. That Statement required the Corps to implement all aspects of the RPA, including summer low flow in order to avoid violating *Section 9 of the ESA*.

Defendants argue that Plaintiffs are unlikely to succeed on the merits of their claims because the 2003 Supplemental BiOp is a well-reasoned, logical addition to the 2000 BiOp, and thus is not arbitrary and capricious. Accordingly, Defendants argue that the Incidental Take Statement contained in the 2003 Supplemental BiOp protects the Corps from any *ESA Section 9* violations that might occur from implementation of the non-low flow regime this summer as outlined in the 2003 AOP. Defendants also assert that the recent FCA decision by the Eighth Circuit and the underlying injunction from the Nebraska District Court binds the Corps to operate the Missouri River Basin to support navigation downstream, and thus bars implementation of the low flow summer regime that Plaintiffs seek to impose.

Plaintiffs have presented a number of arguments in support of their claims that the 2003 Supplemental BiOp and the revised 2003 AOP violate the ESA and APA. In light of the high level of deference given to agency decisions, the Court will examine Plaintiffs' strongest arguments below. Plaintiffs need only establish a likelihood of succeeding on the merits of any one of those claims in order to satisfy this part of the preliminary injunction standard for obtaining the injunctive relief they seek. See *National Wildlife Federation v. Burford*, 266 U.S. App. D.C. 241, 835 F.2d 305, 319 (D.C. Cir. 1987) (affirming district court's decision not to reach the merits of all plaintiff's claims after concluding that plaintiff was likely to succeed on the merits of two claims that would entitle it to permanent injunctive relief).

## 1. Judicial Review of ESA and APA Claims

Plaintiffs' Motion for Preliminary Injunction asserts claims brought under the ESA's citizen suit provision, 16 U.S.C. § 1540(g), and under the APA, 5 U.S.C. § 706(2)(A). Under the ESA, agency decisions are reviewed under the standards set forth in the APA. *Carlton v. Babbitt*, 26 F. Supp. 2d 102, 106 (D.D.C. 1998) (citing *Las Vegas v. Lujan*, 282 U.S. App. D.C. 57, 891 F.2d 927, 932 (D.C. Cir. 1989)). Thus, in reviewing the actions of FWS and the Corps in this case, an agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A).

In making the arbitrary and capricious determination, the court may not substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). Accordingly, the court does not undertake its own factfinding, but reviews the administrative record assembled by the agency to determine whether its decision was supported by a rational basis. See *Camp v. Pitts*, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973). The court's limited role is to ensure that the agency's decision is based on relevant factors and not a "clear error of judgment." *Id.* If the "agency's reasons and policy choices...conform to 'certain minimal standards of rationality' ... the rule is reasonable and must be upheld." *Small Refiner Lead Phase-Down Task Force v. EPA*, 227 U.S. App. D.C. 201, 705 F.2d 506, 521 (D.C. Cir. 1983) (citation omitted).

In exercising its narrowly defined review authority under the APA, a court must consider whether the agency acted within the scope of its legal authority, whether the agency adequately explained its decision, whether the agency based



its decision on facts in the record, and whether the agency considered the relevant factors. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989); *Citizens to Preserve Overton Park*, 401 U.S. at 415; *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 227 U.S. App. D.C. 312, 706 F.2d 1216, 1220 (D.C. Cir. 1983).

The deference a court must accord an agency's decision-making is not unlimited, however. For example, the presumption of agency expertise may be rebutted if its decisions are not reasoned. *ALLTEL Corp. v. FCC*, 267 U.S. App. D.C. 253, 838 F.2d 551, 562 (D.C. Cir. 1988). Where an agency fails to articulate "a rational connection between the facts found and the choice made," *Baltimore Gas & Elec. Co. v. Natural Resources Defense, Council, et al.*, 462 U.S. 87, 88, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983), the Court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Dithiocarbamate Task Force v. EPA*, 321 U.S. App. D.C. 231, 98 F.3d 1394, 1401 (D.C. Cir. 1996) (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). If an agency fails to articulate a rational basis for its decision, it is appropriate for a court to remand for reasoned decision-making. See, e.g., *Carlton v. Babbitt*, 900 F. Supp. 526, 533 (D.D.C. 1995) (remanding FWS's 12-month finding that the grizzly bear should not be reclassified because the FWS "failed to sufficiently explain how it exercised its discretion with respect to certain of the statutory listing factors").

## **2. Under the FCA, the Corps Has the Discretion, and Thus the Obligation, To Manage the Missouri River in Compliance with the ESA.**

Under the ESA, government agencies are obligated to protect endangered and threatened species to the extent that

their governing statutes provide them the discretion to do so. See *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n*, 295 U.S. App. D.C. 218, 962 F.2d 27, 34 (D.C. Cir. 1992) (The ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act.") (emphasis in original) (internal citation and quotations omitted); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998): (The ESA "serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their existing authority in a particular direction.").

In assessing statutory authority and discretion with regard to ESA obligations, courts have found that if an agency has any statutory discretion over the action in question, that agency has the authority, and thus the responsibility, to comply with the ESA. See *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000) (affirming that water contractors' right to water "[was] subservient to the ESA" because the Bureau of Reclamation had the "authority to direct Dam operations to comply with the ESA" given its retention of Dam management and ownership under those water contracts); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 2003 U.S. App. LEXIS 11672, No. 02-2254, 2003 WL 21357246, \*14 (10th Cir. June 12, 2003) (Bureau of Reclamation had "to fulfill its obligations under the ESA" given its "discretion under [water] contracts to determine the 'available water' to allocate.").

Under the FCA, Congress provided that the Secretary of the Army "shall...prescribe for the use of storage water allocated for flood control or navigation at all reservoirs constructed [under this Act] ... and the operation of any such project shall be in accordance with such regulations." 33 U.S.C. § 709. Thus, it is clear that the FCA does not deprive

the Corps of all discretion in its management of the Missouri River Basin. In fact, the Eighth Circuit acknowledged that

the *Flood Control Act* clearly gives a good deal of discretion to the Corps in the management of the River. But this discretion is not unconstrained; the Act lays out purposes that the Corps is to consider in managing the River.... While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for. Flood Control Act Section 4, 58 Stat. at 889-90. The text of the *Flood Control Act* thus sets up a balance between flood control, navigation, recreation, and other interests... [and the] *Flood Control Act* calls on the Corps to balance these various interests.

*Ubbelohde*, 330 F.3d at 1027 (emphasis added). The FCA provides the Corps the discretion to consider its ESA obligations as one of the "other interests" to be balanced when making river management decisions under the FCA. Moreover, such ESA compliance can come at the expense of other interests, including navigation and flood control given the Supreme Court's conclusion that the ESA "reveal[ed] a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies. *TVA*, 437 U.S. at 185 (emphasis added).

For more than a decade, the Corps and FWS have been in consultation over revision of the Master Manual and operation of the Missouri River Basin to achieve compatibility with the ESA. See 1990 BiOp at 3 (FWS "received a request from the Corps...to initiate formal consultation on [Missouri River Basin] operations."); 2000 BiOp, Executive Summary at 1 (The Corps "asked [FWS] to formally consult under the [ESA] on the Operations of the Missouri River Main Stem System."); Corps A.R., Doc. 1614

(Dec. 20, 2002 letter from the Corps to FWS requesting "to initiate formal consultation on the 2003 [AOP]"). In fact, the Corps stated that it had entered into consultation with FWS "under *Section 7 of the ESA* to determine... [measures that would] ultimately achieve conditions that are necessary to satisfy [ESA] requirements" and noted that it looked forward to "further consultation" with FWS. Ex. 10 to Pls.' Schneider Decl. at 2 (Sept. 27, 2002 letter from the Corps to FWS). It is hard to believe that the Corps would have participated in this lengthy consultation unless it recognized and accepted its obligations to conform Master Manual revision and its management of the Missouri River Basin to the ESA.

Defendants rely on the Eighth Circuit's recent holding in *South Dakota v. Ubbelohde* to argue that the Corps does not have the statutory discretion to manage the Missouri River Basin in compliance with the ESA because the Master Manual, with its priority to maintain navigation, "is binding on the Corps." *Ubbelohde*, 330 F.3d at 1033. While the Eighth Circuit did find that the Master Manual was binding on the Corps, the Master Manual itself affords the Corps discretion in management of the Missouri River. n14 The Master Manual allows the Corps to consider a variety of factors when setting the annual navigation season, such as preferable season length and drought conditions. Master Manual at IX-6-7, pt. 9-15; IX-9, pt.9-18.

n14 In fact, FWS long ago determined that the ESA applied to activities performed and decisions made pursuant to the Master Manual. See Ex. 28 to Pls.' Schneider Decl. at 2 (Oct. 19, 1992 letter from Interior Department Regional Solicitor to FWS Regional Director).

Accordingly, the Court concludes that the FCA, as well as the Master Manual, afford the Corps sufficient discretion in its management of the Missouri River Basin to require the Corps to fulfill its responsibilities under the ESA. n15

n15 The Court also notes that it is unlikely that the State of Nebraska will be successful in its crossclaim against the Federal Defendants; alleging that the entire ESA consultation process for the Missouri River Basin is illegal given the Corps' alleged overall lack of discretion under the ESA. See, generally, *State of Nebraska's Crossclaim* (filed 4/10/03).

### **3. Plaintiffs Are Likely to Succeed on Their Claims That the 2003 Supplemental BiOp Violates the ESA and APA.**

#### **a. The 2003 Supplemental BiOp's No Jeopardy Finding Is Premised on a Condition That Is Virtually Certain Not to Occur.**

The cornerstone of the 2003 Supplement BiOp's no jeopardy finding for the least tern, piping plover, and pallid sturgeon is the assumption that the Corps will be in full compliance with ESA-required flow changes in the future. The 2003 Supplemental BiOp explicitly states that its findings were

specific to the 2003 operating year with the understanding that future operation will be consistent with the November 2000 biological opinion or an operational alternative (i.e., new Master Manual) provided by the Corps that removes jeopardy.

2003 Supplemental. BiOp at 10 (emphasis added).

A no jeopardy finding under the ESA must have a reasonable certainty of occurring, not just a reasonable chance. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1213 (D. Ore. 2003) (finding a BiOp arbitrary and capricious because its no jeopardy finding relied on non-federal mitigation actions which were not



guaranteed to occur). In *National Wildlife Federation*, the court found that a majority of NMFS' no jeopardy finding was premised on acts that were "not reasonably certain to occur." *Id.*, 254 F. Supp. at 1214. In this case, FWS' reliance on purely speculative actions by the Corps is even more clear cut. While it is true that the 2003 Supplemental BiOp presented a number of factors that contributed its no jeopardy finding, it is clear that its overall conclusion that the revised 2003 AOP would not cause jeopardy was based on the presumption that the Corps would implement the appropriate water management changes in the future.

Here the Corps has made it perfectly clear that it has no intention of ensuring that its future operations will be "consistent with the [2000 BiOp] or an operational alternative (i.e., new Master Manual) provided by the Corps that removes jeopardy." 2003 Supplemental BiOp at 10. At the very lengthy Motions Hearing, the attorney for the Federal Defendants was repeatedly questioned about the assurances or commitments that the Corps were prepared to give regarding future compliance with the 2000 BiOp and the attorney admitted that no such assurances had been, or would be, given. See Tr. 95:9 - 98:12. n16

n16 During the Motions Hearing, the following colloquy took place between the Court and the Federal Defendants' attorney:

THE COURT: What kinds of commitments is the Corps offering so as to give any credibility to its promise that it will not take a similar position in 2004, and that it will, indeed, comply with the biological opinion of 2000?

MR. MAYSONETT: Well, I think the Corps'... [is] working through revisions to the Master Manual, and they are engaged in consultation with the Fish and Wildlife Service for the Master Manual... To the extent

that the Corps doesn't operate under the RPA set out in the 2000 biological opinion in the future, it has to go to ... Service again to initiate consultation.... So to the extent that the Corps doesn't implement the RPA or a suitable alternative..., the Corps and the Service will be in consultation again next year... There is nothing in the 2003 biological opinion that indicates that the Service -- in fact there are statements to the contrary that show that the Service is not simply going to agree that this level of take every year is -- will ensure that these species are not likely to be jeopardized.

THE COURT: Well, I guess I certainly got an answer by silence to my question, which was, what commitments and assurances is the Corps prepared to offer to establish that next year it will comply with the 2000 biological opinion, and your answer, in effect, was none. Isn't that right?

MR. MAYSONETT: Well, I'm not certain what assurances the Corps could offer.

THE COURT: Isn't that the precondition of the 2003 biological opinion, that the Corps will, next year, comply with the 2000 biological opinion?

MR. MAYSONETT: ... To the extent that the Corps does something else that doesn't fall within the scope of the [2000] biological opinion, it will have to reengage in consultations with the Service.

THE COURT: The 2003 biological opinion says there will be no jeopardy if, as of next year, the 2000 biological opinion is followed, does it not say that?

MR. MAYSONETT: It does.

THE COURT: Therefore, the precondition it seems to me, or maybe you want to call it the fundamental assumption of the 2003 biological opinion, is that there

will be compliance next year with the 2000 biological opinion, and what I hear you telling me is that the Corps is certainly not prepared to give any assurances whatsoever that next year we won't be back in my courtroom with the same request for a preliminary injunction, because it is not going to follow the 2000 biological opinion. Isn't that right? That you cannot or you are not making those assurances now?

MR. MAYSONETT: Well, I am not making those assurances now...

Tr. 95:9 - 98:12.

In addition, it is virtually certain no revised version of the Master Manual will be completed in time to be used in the 2004 water year, since both the Corps and FWS have stated that they intend to reinitiate or continue consultation on Missouri River Basin operations. See 2003 Supplemental BiOp at 4 ("The Corps and [FWS] may reinitiate *section 7* formal consultation on Missouri River operations."); 7/2/03 Motions Hearing Transcript ("Tr.") at 95:15-17 (The Corps is "engaged in consultation with the Fish and Wildlife Service for the Master Manual.")

Under the ESA, FWS had the obligation to determine that there was a reasonable certainty that the revised 2003 AOP would not cause jeopardy to the least tern, piping plover, and pallid sturgeon, and under the APA, they had to give a reasonable explanation for that determination. Given that there is not even a reasonable certainty that the Corps will comply with the 2000 BiOp or prepare a revised Master Manual in the coming year, the Court concludes that Plaintiffs will be likely to prove that the 2003 Supplemental BiOp violated the ESA and APA by improperly and unreasonably relying on future actions by the Corps that are virtually certain not to occur.

**b. The 2003 Supplemental BiOp Is an Improper Segmentation of ESA Consultation.**

Under the ESA, FWS is required to consider the Corps' proposed action in the context of its overall management of the Missouri River Basin. Instead, FWS considered the effects of the revised 2003 AOP only in the context of one isolated year--FY 2003. Significantly, FWS' own regulations prohibit this very type of segmentation while consulting on agency action. FWS regulations require that its ESA consultations evaluate "the effects of other activities that are interrelated or interdependent" with the action under consideration, including "those that are part of a larger action and depend on the larger action for their justification." 50 C.F.R. § 402.02 (definition of "effects of the action"). By narrowly focusing its analysis on the impacts of 2003 high summer flows on the least tern, the piping plover, and the pallid sturgeon in this year only, instead of evaluating both the present and future effects of the 2003 low summer flows on these species, the 2003 Supplemental BiOp ignores this requirement.

Nor can there be any question that the ESA requires that all impacts of agency action--both present and future effects on species--be addressed in the consultation's jeopardy analysis. See *Conner v. Burford*, 848 F.2d 1441, 1457-58 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989) (the ESA "does not permit the incremental-step approach" of consultation because "biological opinions must be coextensive with the agency action").

Moreover, there are significant reasons to reject the segmentation FWS has utilized in this case. If FWS were allowed to apply such a limited scope of consultation to all agency activities, any course of agency action could ultimately be divided into multiple small actions, none of which, in and of themselves, would cause jeopardy.

Moreover, such impermissible segmentation would allow agencies to engage in a series of limited consultations without ever undertaking a comprehensive assessment of the impacts of their overall activity on protected species. The ESA requires more; it "requires that the consulting agency scrutinize the total scope of agency action." *North Slope Borough v. Andrus*, 486 F. Supp. 332, 353 (D.D.C. 1980), *aff'd in part, rev'd in part on other grounds*, 206 U.S. App. D.C. 184, 642 F.2d 589 (D.C. Cir. 1980) (emphasis added).

Because the 2003 Supplemental BiOp confines itself to considering only the effects of the Corps' actions during this summer, the Court concludes that Plaintiffs have demonstrated a substantial likelihood of succeeding on its claim that FWS improperly segmented its consultation duties in violation of the ESA.

**c. The 2003 Supplemental BiOp Fails to Adequately and Reasonably Explain Its Departure from the 2000 BiOp's Conclusion that Flow Changes Were Required by 2003 in Order to Avoid Jeopardy to the Least Tern, Piping Plover and Pallid Sturgeon.**

Plaintiffs argue that the Court should apply heightened scrutiny to the FWS' 2003 Supplemental BiOp, because APA review is "heightened somewhat" when an agency's action reverses its prior position. *NAACP v. FCC*, 221 U.S. App. D.C. 44, 582 F.2d 993, 998 (D.C. Cir. 1982) (affirming reversal of a previous agency policy based on extensive data regarding the changing circumstances that supported its reversal of position). In response, the Federal Defendants argue that the 2003 Supplemental BiOp does not represent a reversal of agency position, but rather an "amendment" which is consistent with the 2000 BiOp's analysis of the Corps' overall management plan for the Missouri River Basin.



The Court finds that FWS has failed to articulate any reasonable explanation for its departure from--not to say abandonment of--the analysis contained in the 2000 BiOp. See *NAACP*, 221 U.S. App. D.C. 44, 682 F.2d 993, 998 (agency decision is only rational if the agency has "articulated permissible reasons for that change").

It is undisputed that the parties still consider the 2000 BiOp to be "the controlling biological opinion," 2003 Supplemental BiOp at 13. The 2000 BiOp clearly stated that the Corps needed to implement low summer flow, along with all other portions of the RPA, no later than 2003 in order to protect the three species from jeopardy. 2000 BiOp at 243. FWS then turned full circle and concluded in the 2003 Supplemental BiOp "that the revised [2003 AOP] . . . , in combination with all other aspects of the RPA from the [2000 BiOp], is a suitable replacement for the summer low flow component of the RPA" to protect against jeopardy to the species. 2003 Supplemental BiOp at 13.

When faced with a similar reversal of the importance of timely compliance with, a BiOp's RPA, the court in *Southwest Center for Biological Diversity v. Babbitt* found that the agency had acted arbitrarily and capriciously. *Id.*, 2000 U.S. Dist. LEXIS 22477, Nos. Civ. 97-0474 PHX-DAE, 97-1479 PHX-DAE, 2000 WL 33907602 (D. Ariz. Sept. 26, 2000). In that case, FWS had issued a BiOp with specific deadlines for implementation of RPAs but then issued amendments to the BiOp which abandoned those time requirements. The court determined that the amendments were arbitrary and capricious because "the previous BiOp established that time [was] of the essence in implementing the RPA" but the amendments fail[ed] to provide a scientific basis" for changing those timelines. 2000 U.S. Dist. LEXIS 22477, 2000 WL 33907602 at \*11. In this case, it is equally clear that FWS "is attempting to say that the deadlines [for

summer low flow] are not essential when it has already been established [for three years] that they are." *Id.*

FWS cites improvements in fledge ratios for the least tern and piping plover over the last few years to justify its 2003 no jeopardy finding. However, the agency fails' to explain why improvement in what was only one of many factors relied upon in the 2000 BiOp, now justifies total abandonment of the need for low flow targeted as absolutely necessary in the 2000 BiOp. In addition, while FWS found that allowing one season of take in this year will not lead the species to extinction, the 2003 Supplemental BiOp fails to even address how this one year of take will affect not just harm, but ultimate recovery of the three species which are in peril. See 50 C.F.R. § 402.02 (FWS defines jeopardy as actions which would "reduce appreciably the likelihood of both the survival and recovery of a listed species....") (emphasis added); see also *Nat'l Res. Def. Council v. Evans*, 232 F. Supp. 2d 1003, 1047-48 (N.D. Cal. 2002) (finding that plaintiffs were likely to prevail in showing that NMFS acted arbitrarily and capriciously by failing to examine whether the challenged action was "likely to adversely affect the recovery of these species, even if it would not affect their survival").

Finally, FWS has failed to explain why improvements in the condition of the least tern and piping plover n17 over the past three years warrants such a dramatic departure from the conclusions of the 2000 BiOp's requiring low summer flow. These conclusions were based on literally decades of data and supported by multiple scientific panels. See § IB2b, *supra* (discussing NAS and FWS/Corps-peer review of the 2000 BiOp). In fact, not only has the 2003 Supplemental BiOp not undergone similar peer review, the Federal Defendants did not even allow public comment on it. See Tr. at 32:2-4 ("Unlike the 2000 biological opinion, there was no public comment, no scientific input, no peer review...for the 2003 biological opinion.").

n17 No improvement has been observed in the plight of the pallid sturgeon.

In addition, the state wildlife officials who did submit comments argued that there was no "new biological information that would alter the conclusions and recommendations of the [2000 BiOp]" and concluded that the information that had been collected since the completion of the 2000 BiOp, from the "the [RDEIS], the [NAS] report...., tern and plover river fledgling success in 2002, plover populations modeling..., and [other] analyses...all point to the need to implement and test alternatives to current [Missouri River Basin] operations.". Ex. 21 to Pls.' Schneider Decl. at 1 (April 8, 2003 letter to J.K. Towner of FWS from S. Adams of the Missouri River Natural Resources Committee ("MRNRC"), a collection of relevant wildlife agencies from both Upper and Lower Basin states on the Missouri River n18 ); see also Ex. 20, 23-27 (letters from each of the individual agencies of the MRNRC, restating that committee's position).

n18 MRNRC members include: Montana Dept. of Fish, Wildlife, and Parks; North Dakota Game and Fish Dept.; South Dakota Dept. of Game, Fish, and Parks; Nebraska Game and Parks Comm.; Iowa Dept. of Natural Resources; Kansas Dept. of Wildlife and Parks; and Missouri Dept. of Conservation.

Consequently, the Court concludes that Plaintiffs are likely to prove that the 2003 Supplemental BiOp is arbitrary and capricious given FWS' failure to "satisfactorily explain" why it has abandoned the 2000 BiOp's extensively peer-reviewed and approved requirement for implementing summer low flow no later than 2003: See *National Audubon Society v. Hester*, 255 U.S. App. D.C. 191, 801 F.2d 405, 408 (D.C. Cir. 1986) (holding that any alteration to agency action

can be held arbitrary and capricious if the agency does not "satisfactorily explain" its reason for the alteration).

**d. Plaintiffs Are Likely to Establish that the 2003 AOP Violates the ESA.**

Having found it likely that Plaintiffs will be able to prove that the 2003 Supplemental BiOp violated both the ESA and APA, the Court must now evaluate the revised 2003 AOP under the controlling ESA document--the 2000 BiOp. It is undisputed that the Corps' revised 2003 AOP does not implement low summer flows, and it is also undisputed that the 2003 AOP's flow mandates will result in significant takes of both piping plovers and least terns. See 2003 Supplemental BiOp at 10 ("Depending on conditions in 2003, losses for terns and plovers (eggs and chicks) are predicted to be between 15 and 121 individuals/birds."). Thus, it is clear that under the terms of the 2000 BiOp's Incidental Take Statement, which required implementation of the RPA's, summer low flow, the Corps' take of these species will be illegal.

While Defendants may try to argue that no *section 9* violation can be found when a take has not yet occurred, a violation of *Section 9* is actionable once a "take" is shown to be "imminent." *Marbled Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996); see also *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (injunction may issue under *section 9 of the ESA* when there is a "reasonably certain threat of imminent harm to a protected species"). Given that FWS stated that water releases under the revised 2003 AOP would lead to "inundation after nest initiation" with a predicted loss of up to 121 terns and plovers, 2003 Supplemental BiOp at 10, the Court finds that the Corps' take of terns and plover is imminent and thus actionable.

Moreover, the undisputed nature of the harm to the three protected species, as well as the degradation of their habitat, that will occur from the Corps' management of river flow under the revised 2003 AOP also demonstrates that the Corps is likely to violate its affirmative obligation under *ESA Section 7* to "insure" that its actions will not harm the species. *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) ("While consultation...may have satisfied the Navy's procedural obligations under the ESA, the Navy may not rely solely on a FWS biological opinion to establish conclusively its compliance with its substantive obligations under *section 7(a)(2)*"); see also *Resources Ltd., v. Robertson*, 35 F.3d 1300, 1304-05 (9th Cir. 1993). (finding that an agency "acted arbitrarily and capriciously in concluding, on the record as a whole, that [its] Plan would not jeopardize listed species" when its own studies raised "serious questions" about the effects of its plan on a threatened species).

Accordingly, the Court concludes that Plaintiffs are likely to succeed in establishing that the Corps' revised 2003 AOP violates both *sections 7 and 9* of the ESA because it fails to insure that ESA-listed species will not be harmed and, in fact, results in take of both endangered and threatened species.

#### **D. Failure to Grant an Injunction Will Cause Irreparable Harm to These Three Species**

As demonstrated, the Corps' current management plan will result in a direct take of two of the species in excess of that permitted under the 2000 BiOp and harm to the habitats of all three protected species. Plaintiffs argue that the three listed species will be irreparably harmed if an injunction is not issued to stop the Corps' illegal take. As already noted above, implementation of the revised 2003 AOP would result in significant take of both piping plovers and least terns. See



2003 Supplemental BiOp at 10 ("Depending on conditions in 2003, losses for terns and plovers (eggs and chicks) are predicted to be between 15 and 121 individuals/birds."). Regarding harm to the pallid sturgeon under the revised 2003 AOP, FWS admitted effects to pallid sturgeon were "difficult to assess." *Id.* at 12.

Defendants contend that Plaintiffs cannot show irreparable harm to the species to the extent required under the ESA because the 2003 Supplemental BiOp determined that any take was not likely to cause jeopardy to or cause extinction of the least tern, piping plover, or pallid sturgeon. Since the Court has already concluded that Plaintiffs are likely to prove that the 2003 Supplemental BiOp is arbitrary and capricious, and therefore without legal effect, Defendants cannot rely on that BiOp to argue that there is no irreparable harm. Instead, the Court relies on the findings in the 2000 BiOp--the BiOp that all parties deem to be controlling--which clearly states that the Corps' continued implementation of navigation-focused management of the Missouri River is "likely to jeopardize the continued existence" of these species and that flow changes are necessary in order to "eliminate jeopardy." 2000 BiOp, Executive Summary at 1-2.

In considering whether a proposed agency action will cause irreparable harm to threatened or endangered species, another member of this District Court has concluded that even when there was "not the remotest possibility that [the planned agency activity] during the period in which a preliminary injunction would be in place [would] eradicate the species," the strong congressional mandate contained in the ESA to protect endangered and threatened species supported the finding that "the loss even of the relatively few [individuals] that are likely to be taken through [an agency action] during the time it will take to reach a final decision in this case is a significant, and undoubtedly irreparable, harm." *Fund for Animals*, 1991 U.S. Dist. LEXIS 13426, 1991 WL

206232 at \*8 (enjoining a hunting season which would have killed an estimated three threatened grizzly bears).

Presently, the piping plover population on the Missouri River consists of about 2,000 birds, and there are approximately 7,000 birds in the tern population. Tr. 94:16,19. The implementation of high summer flows under the revised 2003 AOP will result in a direct take of these birds through flooding of nests. 2003 Supplemental BiOp at 10. While it is undisputed that high flow this summer will not lead to extinction of the species this year, the 2000 BiOp made clear that long term recovery of the species is dependant, in large part, on the long-planned implementation of low summer flow in 2003. n19 Thus, the Court finds that implementation of the revised 2003 AOP will result in irreparable injury to the recovery and continued existence of these birds.

n19 The 2003 Supplemental BiOp relies heavily on recent increases in tern and plover fledgling rates to support its no jeopardy finding. While all parties debate the scientific propriety of this reliance given that unusual drought conditions have increased tern and plover habitat, it is undisputed that the 2000 BiOp considered fledgling rates to be only one of many factors for be considered in species longevity and recovery. See 2000 BiOp at 270 (Attainment of certain fledge ratios "is not likely to result in jeopardy...when the reasonable and prudent alternative is implemented.").

The plight of the pallid sturgeon is even more dire. It is estimated that fewer than 2000 wild pallid sturgeon remain alive in the United States, and they live primarily in the Missouri River. 2000 BiOp at 105. The pallid sturgeon is on the brink of extinction. When listing the species as endangered, FWS specifically stated that "damming, channelization, altered and/or degraded water quality, and 'altered flow regimes" were detrimental to the fish and that these threats to the species' viability were "not likely to be

modified to avoid jeopardy...without protection under the Act." 55 *Fed. Reg.* 36646. The 2003 Supplemental BiOp found that because there is no evidence that pallid sturgeon are reproducing in the wild, implementation of the revised 2003 AOP was unlikely to cause direct harm to this endangered species. 2003 Supplemental BiOp at 12. However, the 2000 BiOp found, in contrast, that summer low flow was required to insure the overall existence and recovery of this species by providing for both the future stock of forage fish upon which juvenile pallid sturgeon will feed and the general health of the sturgeon habitat. 2000 BiOp 241-43. Given the extremely weakened state of the pallid sturgeon population on the Missouri River, the Court finds that any potential harm from delaying implementation of summer low flow is irreparable and must be avoided.

Under the ESA, agencies are required to insure that their actions harm neither the existence nor recovery of endangered and threatened species. Implementing high summer flows in 2003 will cause direct take of the least tern and piping plover and direct harm to the habitat and food source of the pallid sturgeon. Implementing high summer flow in 2003 is also highly likely to produce negative long-term effects on the existence and recovery of these endangered and threatened species. Consequently, the Court concludes that implementation of the revised 2003 AOP will cause irreparable harm this summer that can only be avoided through issuance of a preliminary injunction. Cf. *North Slope Borough*, 486 *F. Supp.* at 331 (finding no irreparable harm because the challenged agency activities were not scheduled to begin until the next year, allowing the court to make a full determination on the merits before any harms could occur).

**E. Harm to the Species in Denying an Injunction Outweighs Injury to Defendants in Granting One.**

While Defendants contend that the harms to the Corps and downstream interests are sufficient to block issuance of the injunction, Plaintiffs argue that a balancing of the harms and benefits to the Missouri River Basin weighs greatly in favor of issuing an injunction. There is no denying that there will be injury to Defendants, Intervenor, and the lower Basin states in general by granting a preliminary injunction. However, the degree of injury is extremely unclear because Defendants have failed to offer specific, concrete evidence of the economic harms they will face.

The most direct injury will be suffered by the seven barge companies that operate on the lower Missouri River and will be precluded from operating during the low flow period. However, the Court notes that the impacts of instituting low flow this summer would be similar to--although more severe than--the low summer flow experienced for eight days on the River last summer because of drought conditions--a summer navigation season which the barge companies did in fact survive. While Missouri has presented arguments of economic harm from increased transportation costs arising from loss of barge navigation, see Missouri Opp'n at 7-8, the extent of those impacts are purely speculative. n20 In addition, Plaintiffs argue that economic loss from decreased navigation on the Missouri River will be offset by benefits to navigation on the Mississippi River.

n20 The State of Missouri has recently submitted an expert declaration which attempts to provide a less speculative analysis of losses. However, as discussed above, the Court will be issuing this decision without reliance on any expert declarations given Defendants' Motions to Strike the expert declarations submitted by Plaintiffs.

Defendants have also argued that granting a preliminary injunction for low summer flow would negatively impact hydroelectric power or water quality interests. Low summer flow could well result in economic losses to hydroelectric

power that would eventually be passed on to consumers who use that power. See MRES Opp'n at 12 (noting that consumers could experience a rate increase of approximately 3-20 percent). However, the Corps also concluded that during last year's drought conditions, low flow releases resulted in "no significant impacts to hydropower." Corps A.R., Doc. 1630 (Jan. 21, 2003 letter from Corps to Senator Nelson).

Even though Missouri may experience possible injury to its water quality during low flow periods, Missouri Opp'n at 8-9, the State of North Dakota argues that its water quality suffers when the Corps maintains high summer flow by drawing down its reservoirs. Indeed, the State of North Dakota has even filed a Clean Water Act, 33 U.S.C. § 1251 *et seq.*, lawsuit against the Corps to protect its own water quality, see, generally, North Dakota's Statement of Position (citing North Dakota v. United States Corps of Engineers, et al., Civ. No. A1-03-050 (D.N.D.)).

Significantly, the economic analysis presented in the Revised Draft Environmental Impact Statement ("RDEIS") indicates that there will be substantial net economic benefits to the entire Missouri River Basin from implementing the 2000 BiOp RPA even with its summer low flow. The Corps' detailed study did find that implementing the 2000 BiOp RPA, including summer low flow, would cause navigation interests to experience a loss of approximately 32% of benefits with interruption of the navigation season in midsummer, see RDEIS at 14 (loss of approximately \$2.25 million out of \$7 million) and would cause water supply interests to experience a loss of less than 1 percent of benefits, see RDEIS at 16 (loss of approximately \$1.6 million out of \$610 million). Effects on hydroelectric power were more difficult to assess because an annual benefit of approximately \$13 million would be offset by a loss in revenues attributed to redistribution costs. RDEIS at 14-15.



Most importantly, however, the Corps concluded that changing to low summer flow would produce a total net economic benefit of approximately \$8.8 million annually after consideration of all interests in the Missouri River Basin. RDEIS at 5-131, Table 5.13-1.

Defendants have presented primarily economic injuries that would result from issuing the requested injunction, but the Court finds that loss of the least tern, piping plover, and pallid sturgeon cannot be translated into such simple economic terms, because, as the Supreme Court has noted, the "value this genetic heritage is, quite literally, incalculable." *TVA, 437 U.S. at 178* (quoting H.R. Rep No. 93-412, pp. 4-5 (1973)).

Consequently, in balancing the benefit to the Plaintiffs and the endangered species they represent from granting an injunction against the harms to the Defendants and the diverse interests they represent, the Court concludes that the balance weighs in favor of granting the injunction. Congress has indeed "spoken in the plainest of words," making it abundantly clear that it has given the policy of conservation of endangered species "the highest of priorities." *Id. at 194*. Thus, when as in this case, we weigh the benefits to two species near extinction and one threatened with extinction, whose loss will be "incalculable," against the temporary economic harm to seven barge companies, hydroelectric power interests, and consumers, especially in light of the total net economic benefits, the balance must be struck in favor of "the overwhelming need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources." *Id. at 177* (quoting, with approval, Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 *N.D.L.Rev.* 315, 321 (1975)) (emphasis in Supreme Court quotation).

### **F. Public Interest Considerations Favor Granting the Preliminary Injunction.**

Finally, Plaintiffs argue that public interest considerations should weigh greatly in favor of the three protected species. While this Court is not relying on the Supreme Court's decision in *TVA v. Hill* to conclude that public interest considerations under the ESA must always be decided in favor of the endangered species, see *Strahan*, 127 F.3d at 160 (finding that public interest considerations were "answered" in favor of the endangered species), Congress' enactment of the ESA clearly indicates that the balance of interests "weighs heavily in favor of protected species. *Burlington N.R.R.*, 23 F.3d at 1510 (emphasis in original).

Moreover, the injunctive relief sought by Plaintiffs would not only serve to protect the least tern, piping plover, and pallid sturgeon, but would also serve to protect the entire Missouri River Basin ecosystem. See *NRDC*, 232 F. Supp. 2d at 1053 (issuing an injunction because it would serve the strong public interest preserving endangered species as well as a healthy environment) Until management of the Missouri River Basin is returned to a more natural and historic state, "degradation of the Missouri River ecosystem will continue." NAS Report, Executive Summary at 3. Finally, as already noted, the Corps found that implementing a management plan with summer low flow would produce an overall net economic benefit to the entire Missouri River Basin, see RDEIS at 5-131, Table 5.13-1 (noting a \$ 8.8 million annual net economic benefit). Such economic benefits will also benefit the public in general.

Defendants' most troubling public interest argument is that issuing the injunction requested by Plaintiffs will conflict with the action of the Eighth Circuit upholding the injunction issued by the Nebraska District Court. n21 This is a problem of the Defendant's own making. It is

incomprehensible that none of the litigants involved in the Eighth Circuit litigation--the United States Department of Justice as well as the States of North Dakota, South Dakota, and Nebraska--failed to bring to the attention of that court the impact of the *Endangered Species Act* on the obligations of the Corps of Engineers to manage the Missouri River Basin. The decision from the Eighth Circuit contains not a single reference to the ESA, no less a discussion of the interrelationship between the FCA and the ESA. The failure of those parties--particularly the Corps of Engineers which is no stranger to the issue or to litigation--to surface that issue (complicated as it may be) is hard to fathom. Nor was counsel for the Corps able to shed any light on the issue at the motions hearing in this case.

In any event, unfortunate and uncomfortable as the situation may be, it does not constitute a justification for this Court abdicating its responsibilities under the applicable statutes. The public interest is served when the legislation that Congress has enacted is complied, with and federal agencies fulfill their Congressional mandates.

Accordingly, the Court finds that the public interest considerations weigh in favor of enjoining the Corps from implementing the revised 2003 AOP without a summer low flow component.

n21 Of course, this Court is not bound by any ruling of the Eighth Circuit.

#### IV. Conclusion

Plaintiffs have established a likelihood of success on the merits of their. ESA and APA claims against the Federal Defendants, and the least term, piping plover, and pallid sturgeon will face irreparable harm if the Corps is not enjoined from implementing the revised 2003 AOP without a

summer low flow component. Moreover, the balancing of harms and the public interest considerations weigh in favor of issuing an injunction against the Corps. Accordingly, Defendants' Motions to Strike are denied as moot, and Plaintiffs' Motion for Preliminary Injunction is granted. The Corps is hereby enjoined from implementing the summer water flow provisions of the revised 2003 AOP, from taking any action that would implement or be consistent with the provisions relating to summer water flow contained in the 2003 Supplemental BiOp, and from taking any action that would be inconsistent with the provisions relating to summer water flow contained in the 2000 BiOp.

7/12/2003,

GLADYS KESSLER, UNITED STATES DISTRICT JUDGE

#### ORDER

Plaintiffs, a number of national and local environmental organizations, brought suit against the United States Army Corps of Engineers ("Corps"), the Secretary of the United States Army, the United States Fish and Wildlife Service ("FWS"), and the Secretary of the Interior, seeking to protect the endangered least tern, the endangered pallid sturgeon, and the threatened Great Plains piping plover, all of which are protected by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, et seq. Plaintiffs allege that the manner in which the Corps has operated the extensive dam and reservoir system on the Missouri River and the manner in which the FWS has carried out its statutory responsibilities under the ESA have adversely impacted the three species in question. Plaintiffs assert claims against the Corps and the Secretary of the Army under the ESA, the Flood Control Act of 1944, 33 U.S.C. §§ 701, et seq., and the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq., and assert ESA and APA claims against FWS and the Secretary of the Interior.

This matter is now before the Court on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motions to Strike. A motions hearing in this matter was held on July 2, 2003. Upon consideration of the Motions, Oppositions, Replies, amicus curiae and intervenor briefs, the arguments presented at the motions hearing, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

**ORDERED**, that Defendants' Motions to Strike are denied as moot; and it is further

**ORDERED** that Plaintiffs' Motion for Preliminary Injunction is granted. The Corps is hereby enjoined from implementing the summer water flow provisions of the revised 2003 Annual Operation Plan, from taking any action that would implement or be consistent with the provisions relating to summer water flow contained in the 2003 Supplemental Biological Opinion, and from taking any action that, would be inconsistent with the provisions relating to summer water flow contained in the 2000 Biological Opinion.

DATE: 7/12/2003



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Supreme Court, U.S.  
FILED  
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OFFICE OF THE CLERK

No. 05-631

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**In the Supreme Court of the United States**

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**ENVIRONMENTAL DEFENSE AND  
NATIONAL WILDLIFE FEDERATION, PETITIONERS**

*v.*

**UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.**

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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**PAUL D. CLEMENT**  
*Solicitor General  
Counsel of Record*  
**SUE ELLEN WOOLDRIDGE**  
*Assistant Attorney General*  
**JAMES C. KILBOURNE**  
**ROBERT H. OAKLEY**  
*Attorneys*  
*Department of Justice*  
*Washington, D.C. 20530-0001*  
*(202) 514-2217*

## QUESTION PRESENTED

Whether, in conducting judicial review of agency action under the Administrative Procedure Act, a court may uphold an agency's decision on the basis of a rationale offered in the document containing the decision and on the basis of facts contained either in that document or in documents from the administrative record to which the document containing the decision expressly refers.



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# In the Supreme Court of the United States

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No. 05-631

ENVIRONMENTAL DEFENSE AND  
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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
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**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

---

## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 421 F.3d 618. The memorandum and order of the district court (Pet. App. 29a-77a) is reported at 363 F. Supp. 2d 1145.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. In the consolidated action, Nebraska, Missouri, and other downstream parties alleged that a new plan adopted by the Corps in 2004 to govern its management of the Missouri River Basin violated various statutes. In addition, several environmental groups alleged that the actions of the Corps and the Fish and Wildlife Service (FWS) in the Department of the Interior violated the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* The district court granted summary judgment to the federal defendants on all of those claims. Pet. App. 29a-77a. The court of appeals affirmed in relevant part. *Id.* at 1a-28a. Petitioners are two of the environmental groups that brought ESA and NEPA claims.<sup>1</sup>

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<sup>1</sup> North Dakota and South Dakota have filed their own petition for a writ of certiorari, challenging the court of appeals' disposition of the downstream parties' claims under the Flood Control Act of 1944, ch. 665, 58 Stat. 887. See *North Dakota v. United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-611 (filed Nov. 14, 2005). In addition, North Dakota, together with various state agencies and officials, has filed another petition for a writ of certiorari, seeking review of a separate decision in which the court of appeals rejected its claim that the Corps' operations violated state-law water-quality standards. See *North Dakota v. United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-628 (filed Nov. 14, 2005). The federal

1. Congress enacted the Flood Control Act of 1944 (the Act), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legislation, the Act authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska.<sup>2</sup> The Act authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," provided that "the operation of any such project shall be in accordance with such regulations," 33 U.S.C. 709. The Act and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, e.g., *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 499-502 (1988).

The Corps has developed a water-control plan for operation of the Main Stem System, which is embodied

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respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

<sup>2</sup> The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

in the Missouri River Main Stem Reservoir System Master Water Control Manual (commonly known as the Master Manual). The Master Manual was first published in 1960 and was revised in 1973, 1975, and 1979. The Master Manual sets forth general guidelines for operation of the Main Stem System; in addition, each year, the Corps promulgates an Annual Operating Plan, which details its plans for the coming year. Pet. App. 4a, 29a.

2. The Endangered Species Act provides that a federal agency, in consultation with the Fish and Wildlife Service, must ensure that any action it takes is not "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. 1536(a)(2). At the conclusion of its consultation with the agency, FWS must produce a biological opinion in which it determines whether the agency action is likely to result in "jeopardy" or "adverse modification," and, if so, whether there are "reasonable and prudent alternatives" (RPAs) that the agency could undertake to reduce the impact of its action on the affected species. 16 U.S.C. 1536(b)(3)(A); 50 C.F.R. 402.14. The National Environmental Policy Act of 1969 provides that a federal agency must prepare an environmental impact statement (EIS) when undertaking a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). An EIS is "a detailed statement by the responsible official on," *inter alia*, "the environmental impact of the proposed action" and "alternatives to the proposed action." *Ibid*.

The Corps' management of the Missouri River Basin affects several endangered or threatened species, three

of which are at issue here: the pallid sturgeon, an endangered fish; the least tern, an endangered migratory bird; and the piping plover, a threatened migratory bird. The pallid sturgeon lives in the Missouri River and its tributaries; the least tern and piping plover nest on sparsely vegetated sandbars along the river. In 2000, pursuant to the ESA, the Corps consulted with FWS concerning the effects of its Missouri River operations on the three species at issue. In 2000, FWS issued a biological opinion in which it concluded that the Corps' management plan was likely to jeopardize the continued existence of the three species. FWS therefore identified a reasonable and prudent alternative that the Corps could undertake to reduce the impact of its action on the species. In that RPA, FWS proposed that the Corps increase river flows in the spring, in order to scour the sandbars for the bird species and provide a spawning cue for the pallid sturgeon, and decrease river flows in the summer, in order to expose the sandbars for the bird species and increase the amount of shallow-water habitat for the pallid sturgeon. Although FWS described altered flows as an "integral component" of the RPA, FWS also proposed a variety of other changes to the Corps' management plan, including the construction of significant amounts of new habitat for the three species. Pet. App. 5a-8a; C.A. App: 10111-10115, 10117-10128.

3. In 2003, because of the ongoing drought in the Missouri River Basin, the Corps concluded that it was unable to implement the flow changes mandated by the 2000 biological opinion. The Corps therefore reinitiated consultation with FWS pursuant to the ESA. As a result of that consultation, FWS issued a supplemental biological opinion in which it ratified the Corps' proposal to



suspend the flow changes for the period from May 1 to August 15, 2003. Pet. App. 7a.

In June 2003, various environmental groups, including petitioners, filed suit against the federal respondents in the United States District Court for the District of Columbia, challenging FWS's promulgation of the supplemental biological opinion. The district court granted a preliminary injunction, reasoning that the plaintiffs were likely to succeed on their claim, *inter alia*, that FWS had failed sufficiently to explain why it had abandoned its earlier conclusion that flow changes were necessary to protect the species at issue. *American Rivers v. United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255-257, 262 (D.D.C. 2003). In the meantime, the United States Court of Appeals for the Eighth Circuit had affirmed an injunction requiring the Corps to provide enough flow to support navigation. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1033 (2003), cert. denied, 541 U.S. 987 (2004). In light of the apparent conflict between the two injunctions, the Corps initially did not implement the flow reduction mandated by the 2000 biological opinion, and the District of Columbia district court held the Corps in conditional contempt. *American Rivers v. United States Army Corps of Eng'rs*, 274 F. Supp. 2d 62, 71 (2003). Two days later, the Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits involving the management of the Missouri River Basin for pretrial proceedings before a single court in the District of Minnesota. *In re Operation of the Missouri River Supp. Litig.*, 277 F. Supp. 2d 1378, 1379 (2003). The Corps subsequently implemented the flow changes for the remainder of the summer of 2003. Pet. App. 8a.